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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED AND AN INDEX.

BY JOHN W. KERN,

OFFICIAL REPORTER.

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JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. ALLEN ZOLLARS.* †

HON. JOSEPH A. S. MITCHELL.‡ §

HON. WILLIAM E. NIBLACK.†

HON. GEORGE V. HOWK.†

HON. BYRON K. ELLIOTT.‖

* Chief Justice at the May Term, 1887.

† Term of office commenced January 1st, 1883.

‡ Chief Justice at the November Term, 1887.

§ Term of office commenced January 6th, 1885.

‖ Term of office commenced January 3d, 1887.

OFFICERS

OF THE

SUPREME COURT.

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WILLIAM T. NOBLE.

SHERIFF,

MYRON NORTH.

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CHARLES E. COX.

112 1
114 539
117 298
112 1
125 944
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112 1
159 572

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1887, IN THE SEVENTY-FIRST YEAR OF THE STATE.

No. 12,996.

GRAETER *v.* DEWOLF ET AL.

APPEAL BOND.—*Action to Recover Real Estate.—Fixed Penalty.—Liability of Sureties.—Justice of Peace.*—Where, upon an appeal by the defendant from a judgment given against him by a justice of the peace for the possession of real estate and damages for its detention, the appeal bond is executed with a fixed penalty, the sureties therein are not liable beyond the sum stated, whatever may be the amount of the judgment rendered against the defendant in the higher court.

From the Knox Circuit Court.

T. R. Cobb, O. H. Cobb, J. T. Goodman, W. A. Cullop, G. W. Shaw and *C. B. Kessinger*, for appellant.

G. G. Reily, for appellees.

ZOLLARS, C. J.—In March, 1885, a judgment was rendered by a justice of the peace in favor of appellant against Wells R. Stokeley for the possession of real estate, and for $175 damages for the detention thereof.

Stokeley appealed to the circuit court, and executed an appeal bond with appellees, DeWolf and Chambers, as sureties. The appeal bond was as follows:

"We, Wells R. Stokeley, William H. DeWolf and Smiley M. Chambers, acknowledge ourselves bound to Frederick Graeter in the penal sum of five hundred dollars. Witness our hands and seals this 20th day of March, 1885. Whereas said Frederick Graeter within thirty days last past obtained judgment against Wells R. Stokeley before Samuel C. Risley, J. P., for the possession of real estate and for one hundred and seventy-five dollars and — cents, with costs taxed at twenty-three dollars and thirty cents, and said Stokeley has appealed therefrom: Now, if said Wells R. Stokeley shall prosecute his appeal to final judgment, and pay such judgment as may be rendered against him on such appeal, this bond shall be null and void, else in force."

In October, 1885, judgment was rendered in the circuit court in favor of appellant against Stokeley for $1,251. That judgment not having been paid, appellant brought this action upon the above appeal bond. The court below concluded as a matter of law that the sureties, DeWolf and Chambers, appellees here, were not liable beyond the penalty fixed in the bond, and rendered judgment against them accordingly.

From that judgment appellant prosecutes this appeal, and contends that the sureties are liable beyond the penalty fixed in the bond, to the full amount of the judgment against Stokeley in the circuit court.

In the outstart, it is proper to keep in mind that sureties are favorites of the law, and are not bound beyond the strict terms of the engagement; that their liability is not to be extended by implication beyond the terms of their contract, which contract is said to be *strictissimi juris*. *City of Lafayette* v. *James*, 92 Ind. 240 (47 Am. R. 140), and cases there cited; *Weed Sewing Machine Co.* v. *Winchel*, 107 Ind. 260, and cases there cited.

And, also, that a surety on a bond can not generally be

held liable for any sum greater than the penalty thereof. Brandt Suretyship and Guaranty, section 93.

In *Leggett* v. *Humphreys*, 21 How. (U. S.) 66, it was said: "The principle which limits the liability of the surety by the penalty of his bond, inheres intrinsically in the character of his engagement. He does not undertake to perform the acts or duties stipulated by his principal, and would not be permitted to control their performance; and *could not*, where his principal was a public officer, legally assume the functions of that principal. The undertaking of the surety is essentially a pledge to make good the misfeasance or non-feasance of his principal to an amount co-extensive with the penalty of his bond." See, also, to the same effect, *Clark* v. *Bush*, 3 Cow. 151; *Wood* v. *Fisk*, 63 N. Y. 245; *Oshiel* v. *DeGraw*, 6 Cow. 63; *Fairlie* v. *Lawson*, 5 Cow. 424; *Brown* v. *Burrows*, 2 Blatchford, 340; *Brainard* v. *Jones*, 18 N. Y. 35.

In Baylies on Suretics and Guarantors, at page 171, the author says: "The liability of a surety in a statutory obligation is measured by the contract as it is, and not by what the Legislature intended that it should be; and the language of the instrument must be construed as if it had been used in any other instrument; and the fact that the obligation was given in pursuance of a statute, does not alter its plain import, or affect the liability thereunder."

The rule as thus stated does not obtain to its full extent in this State as to official bonds entered into by public officers, nor as to bonds, recognizances or written undertakings taken by any officer in the discharge of the duties of his office. We have a statute which provides that such bonds and undertakings, etc., shall not be void for want of form or substance or recital or condition, nor the principal or surety be discharged; but they shall be bound by such bond, undertaking, etc., to the full extent contemplated by the law requiring the same. R. S. 1881, section 1221.

It has been many times, and correctly, held by this court, that, under this statute, the statutes requiring such bonds,

undertakings, etc., enter into them and become a part of the contract, binding upon the obligors, both principals and sureties, however defective such bonds, etc., may be. But it has not been held that the statute authorizes a recovery against sureties on such bonds, undertakings, etc., in excess of the penalties fixed therein. While the statute, as we have seen, provides that in the cases enumerated the principal and surety in the bond, etc., shall be bound to the full extent of the law requiring the same, it also fixes a limit upon the liability of the surety by the words "and the sureties to the amount specified in the bond," etc.

Interpreting the statute as its language clearly requires, it has been held that when such bonds, etc., as therein enumerated contain a fixed penalty, the surety can not be held in excess of such penalty. *Ward* v. *Buell*, 18 Ind. 104.

If, then, the sureties here may be held in excess of the penalty in the bond in suit, such liability must exist by virtue of some statute or rule of the law other than those thus far noticed.

In his contention for the liability of the sureties beyond the penalty of the bond, appellant relies chiefly upon section 5236, R. S. 1881, and the case of *Opp* v. *TenEyck*, 99 Ind. 345. The case thus relied on is neither conclusive nor controlling here. The bond in suit in that case was defective. It was held that the defect was cured by the above mentioned section 1221 of the statutes. What was said in the opinion was with reference to the case before the court. The question here involved was not a question for decision in the case, and was, of course, not decided. Although the fact is not developed in the opinion, the judgment against the sureties did not exceed the penalty fixed in the bond.

Section 5236, *supra*, is found in the chapter of the statutes entitled "Landlord and Tenant," and is as follows: "On the trial of any cause under this act, either before the justice of the peace or on appeal, the damages for the detention of the premises shall be estimated up to the time of each trial, while

damages on appeal by the defendant shall be deemed as covered by the appeal bond."

This section must be construed in connection with other sections of the statute bearing upon the same subject.

Section 5234 of the same chapter with section 5236, *supra*, provides that an appeal shall lie to the circuit court by either party, under the same regulations and restrictions as in other cases before justices; and that appeal bonds securing damages, if any, and costs, and the prosecution of the appeal, shall be given by the appellant.

The general statute upon appeals from judgments before justices of the peace (section 1500) provides, that the party asking an appeal shall file with the justice a bond, with security to be approved by the justice, payable to the appellee, in a sum sufficient to secure the claim of the appellee and interest and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the circuit court. This section provides for an appeal bond in a fixed sum. Such is the practice. There is nothing in sections 5234 and 5236, *supra*, which is directly, or by implication, in the way of an appeal bond in a fixed and definite penalty. Construing those sections with section 1500, *supra*, as we think they should be, it would seem to be entirely proper that the appeal bond should be in such definite sum and with such sureties as the justice may approve. We conclude, therefore, that an appeal bond with a fixed penalty, in a case like this, is neither illegal nor irregular, as contravening any statute. If, then, as we think, the bond may be in a definite and fixed penalty, it follows that when such a penalty is fixed it becomes a part of the surety's contract, fixing and limiting the amount of his liability, and the general rule applies, which gives him the right to stand upon the strict terms of his contract in that regard.

A plaintiff in an action for the recovery of real estate may recover damages for the detention up to the time of trial in the circuit court, and for the amount thus recovered the

sureties will be liable to the extent of the penalty named in the appeal bond, and no further. So it has been held by this court in construing section 5236, *supra*. *King* v. *Brewer*, 19 Ind. 267; *Sharpe* v. *Harding*, 21 Ind. 334. See, also, *Miller* v. *O'Reilly*, 84 Ind. 168.

If it be said, as it is by counsel for appellant, that the bond is defective by reason of the penalty being fixed at a definite sum, and that we must look to section 1221, *supra*, as curing that defect, then we shall encounter that portion of the section which in express terms limits the liability of sureties to the amount specified in the bond.

The purpose of the statutes under consideration requiring an appeal bond, evidently is to fully secure the parties against whom the appeal is taken; and hence it is the duty of the justice to require a bond in such an amount and with such sureties as will accomplish that end.

If the justice neglects his duty and accepts a bond inadequate in amount, doubtless the court to which the appeal is taken may require a new bond. See R. S. 1881, sections 1283, 1284. And should the justice accept a bond with no fixed penalty, doubtless both principal and sureties would be liable under section 1221, *supra*, to the extent of the law requiring the bond. *State, ex rel.*, v. *Britton*, 102 Ind. 214.

After a careful examination of the question presented by the record and discussed by counsel, we are satisfied that the court below ruled correctly in holding that appellees, the sureties on the bond, are not liable beyond the penalty therein named.

Judgment affirmed, with costs.

Filed Sept. 29, 1887.

No. 12,930.

THE HOME INSURANCE COMPANY v. GILMAN, EXECUTOR, ET AL.

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116	522
117	205
119	46
119	7
125	91
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112	7
128	29
112	7
142	487
143	702
112	7
155	522
112	7
160	214
112	7
*163	386

INSURANCE.—*Joint Action on Policy.—Mortgagee.—Judgment.—Practice.*—Where a policy of insurance, issued to the owner of a building, provides that the loss, if any, shall be paid to a mortgagee "as his interest may appear," such mortgagee and owner may, in case of loss, where the amount of insurance exceeds the sum secured by mortgage, maintain a joint action against the insurance company, and are entitled to have the judgment fix the amounts due to each respectively.

SAME.—*Policy.—Principal and Agent.—Payment of Premium.—Estoppel.—Fraud and Mistake.*—Where a duly authorized agent of an insurance company delivers a policy of insurance, which acknowledges on its face that the premium has been paid, such acknowledgment concludes the company from thereafter denying the payment of the premium for the mere purpose of assailing the legal existence of the policy, unless the same was procured by fraud or through a mistake.

SAME.—*Waiver of Payment of Premium.*—The agent of an insurance company, authorized to deliver policies and receive payment, may waive the payment of the premium in cash, notwithstanding a stipulation in the policy to the contrary, and, in the absence of bad faith and collusion, a policy so delivered is enforceable

SAME.—*Contract.—Authority of Agent.—Premium.—Payment of.*—The agent of an insurance company, authorized to deliver policies and receive payment, issued and delivered a policy of insurance, there being an agreement between him and the assured that the amount of the premium fixed should be credited upon his individual indebtedness to the latter, which was done. The agent made report of the policy, and transmitted the amount of the premium to the company in due course, which the latter received and retained until suit was brought, when it tendered the same to the assured. In an action upon the policy,

Held, that in the absence of fraud the company is liable.

SAME.—*Pleading.—Complaint.—Ownership of Property Insured.*—In an action against an insurance company upon a policy of insurance, where the complaint alleges the plaintiff to be the owner in fee simple of the property destroyed, and the evidence shows that he held an executor's deed thereto, under which he had in good faith taken possession, the insurance company can not by way of defence attack such conveyance by questioning the power of the executor in that regard.

From the Newton Circuit Court.

B. Harrison, W. H. H. Miller and *J. B. Elam*, for appellant.
S. P. Thompson and *J. W. Oswalt*, for appellees.

MITCHELL, J.—A policy of fire insurance was issued to George Sapp, the alleged owner of a store building, stipulating for insurance against loss or damage by fire to the amount of fifteen hundred dollars.

The policy contained the following stipulation: "Loss, if any, under this policy, payable to W. W. Gilman, executor of the Reynolds estate, as his interest may appear."

The complaint alleged that at the time the policy was issued, to wit, on the 14th day of February, 1885, as, also, when the property insured was destroyed by fire—February 16th, 1885,—Sapp was the owner thereof, in fee simple, and that Gilman held a mortgage thereon to secure a debt due him from Sapp, amounting to nine hundred dollars. It also alleged that the amount of the loss exceeded the amount of the debt due Gilman. The appellant contends that Sapp and Gilman can not maintain a joint action on this policy, and hence that the court erred in overruling the demurrer to the complaint.

The learned court below was of opinion that an action might be so maintained, and, after hearing the proofs, rendered judgment "that the plaintiffs do have and recover of and from the defendant the sum of $1,537.51, and that of said sum William W. Gilman, as executor of the estate of Henry Reynolds, deceased, shall first recover the sum of $949.51, and the plaintiff George R. Sapp shall recover the residue."

The question is thus presented, whether after the loss Gilman and Sapp had such a joint interest in the policy as entitled them to join as plaintiffs in an action thereon?

Section 262, R. S. 1881, provides that "All persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided;" and by section 269 of the code it is en-

acted that "Of the parties in the action, those who are united in interest must be joined as plaintiffs or defendants," etc.

Section 568 provides that judgment may be given for or against one or more of several plaintiffs, or for or against one or more of several defendants, and that the "Judgment may, * * when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

These statutes must be deemed to have modified the extremely technical and arbitrary rules of the common law, in respect to parties and the rendition of judgments. Their effect is, substantially, to adopt the equitable rules of the chancery courts in regard to these subjects, and they require the application of those rules to each case as it arises, whether it be of a legal or equitable character. *Tate* v. *Ohio, etc., R. R. Co.*, 10 Ind. 174; *Goodnight* v. *Goar*, 30 Ind. 418; Pom. Rem., sections 200, 215; 1 Works Pr. 98, 99.

At the common law it was essential that all those who appeared on the record as plaintiffs should have an interest in the whole of the recovery, so that a judgment *in solido* could be rendered in favor of all the plaintiffs, as, also, against all the defendants.

This rule, never founded upon any substantial reason, has been modified by the provisions of the code already referred to. *Moyer* v. *Brand*, 102 Ind. 301, and cases cited.

While it has often been decided, under the code, that all persons who join as plaintiffs must have *an interest* in the subject of the action, and that it is necessary that they be united in interest (*Dill* v. *Voss*, 94 Ind. 590; *Faulkner* v. *Brigel*, 101 Ind. 329, and cases cited), it does not follow that the interest of all must be equal, or that their interests may not be legally severable. It is, of course, not meant that two or more persons having separate causes of action, although they arise out of the same transaction, and be against the same defendant, may nevertheless unite in the same action. Where, however, there is, as was said in *Tate* v. *Ohio, etc.*,

R. R. Co., supra, "one common interest among all the plaintiffs, centering in the point in issue in the cause, the objection of improper parties can not be maintained," even though the amount of their several interests be unequal, and even though they may be entitled to several judgments, in respect to the amounts to be recovered. All must have some common interest in respect to the subject-matter of the suit, and each must be interested that all have relief in respect to that subject-matter. This creates such a unity of interest as entitles parties so related to a particular subject-matter to unite as plaintiffs in an action. *Martin* v. *Davis*, 82 Ind. 38.

In the case before us both parties plaintiff had, by contract, a common interest that a recovery should be had upon the policy of insurance. It was the interest of each that the other should recover, as well as that he should recover himself. A recovery by the mortgagee enured to the benefit of his co-plaintiff, in that it established a common right. The amount recovered by the mortgagee went in liquidation of the mortgagor's debt, while a recovery by the latter had a like effect upon the common right, and entitled the former to receive payment out of the sum recovered as his interest in the fund might appear. Each was, therefore, interested in the relief sought by the other, and as both appeared upon the face of the policy to have a common interest, neither being entitled to the whole fund, it was proper for the protection of the defendant that both should be parties. "It was not so material whether they were plaintiffs or defendants, so that their rights under the contract would be barred by the event of the suit." *Morningstar* v. *Cunningham*, 110 Ind. 328; *Durham* v. *Hall*, 67 Ind. 123; May Ins., section 449.

There was no error in overruling the demurrer to the complaint.

The seventh paragraph of answer set up, in substance, that the policy sued on had not been delivered or paid for except in the manner following: It averred that two days before the fire occurred, the appellee Sapp applied to the com-

pany's agent at Goodland for insurance. It was then agreed between the agent and the applicant, that, in consideration that the latter would give the agent credit for the premium agreed upon on an indebtedness due from him to the applicant, the agent would make out and deliver a policy of insurance, covering the property, in a stipulated amount. The agent was given credit accordingly, but the policy was not delivered until after the property was destroyed by fire. The agent made due report of the policy, and transmitted the amount of the premium to the company in due course. The company, having no previous knowledge of the manner of payment to its agent, received and retained the premium until after this suit was brought, when, learning the fact, it tendered the amount to the insured.

To this answer the plaintiffs replied, that they made the contract of insurance in good faith with the defendant's agent, and that they were at the time ready and willing to pay the premium, but that payment in money was waived by the company's agent, who accepted in payment credit upon an indebtedness due the insured, and that the agent forwarded the amount of the premium to the home office in the regular course, etc.

It is contended that the court erred in overruling a demurrer to this reply.

The fact must be kept in view that the suit is upon an executed policy of insurance, a copy of which is set out with the complaint. The complaint avers that the policy was executed on the 14th day of February, 1885,—the day of its date—and that the property insured was destroyed by fire on 16th of the same month. There was a general denial pleaded with the other special answers. There was no answer of *non est factum*, nor was the seventh paragraph of answer verified. So far, therefore, as the allegations of the answer go in denial of the execution of the policy prior to the date of the fire, they are immaterial. The answer presented no issue relating to the execution of the policy. The execution of the

policy not having been denied under oath, the plaintiffs below were not bound to prove its execution. *Sperry* v. *Dickinson*, 82 Ind. 132. "Under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove." Section 377, R. S. 1881.

The effect of the answer was, therefore, to admit the execution of the policy, as alleged in the complaint. The question, then, comes to this: Treating the policy as having been delivered at its date, was there such a payment of the premium, or such a waiver of the condition in the policy which provided that "the company shall not be liable by virtue of the policy until the premium therefor be actually paid," as that the policy attached?

The policy contains the following recital upon its face, viz.: "The Home Insurance Company of the City of New York, in consideration of thirty-seven and $\frac{50}{100}$ dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure," etc.

It provides further, in effect, that, upon being countersigned and delivered by the company's duly authorized agent at Goodland, it shall constitute a valid policy of insurance. It was so countersigned and delivered, with the acknowledgment of payment therein written as above set out.

The authorities justify the statement, that where a duly authorized agent of an insurance company delivers a policy of insurance which acknowledges on its face that the premium has been paid, such acknowledgment concludes the company from thereafter denying that the premium was paid, for the mere purpose of assailing the legal existence of the policy. Insurers are estopped to deny that the contract of insurance attached, on account of non-payment, after the policy has been duly delivered and the receipt of the premium duly acknowledged, unless the acknowledgment has been procured through mistake or by fraud. *Basch* v. *Humboldt, etc., Ins. Co.*, 35 N. J. 429; *Provident L. Ins. Co.* v. *Fennell*, 49 Ill. 180; *Teutonia*

L. Ins. Co. v. *Mueller*, 77 Ill. 22; *National Benefit Ass'n* v. *Jackson*, 114 Ill. 533; *Kline* v. *National Benefit Ass'n*, 111 Ind. 462.

In a suit to collect the premium, or where the question of actual payment is involved, such an acknowledgment, like any other receipt, may be only *prima facie* evidence of payment; but a policy so delivered and accepted in good faith constitutes presumptively a valid contract of insurance, and the company assumes the burden of proving that it was delivered and accepted in bad faith, without payment or extension of credit, and in a manner known to the assured to be unauthorized and contrary to the usages of the company.

It is well settled that payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payment, notwithstanding a stipulation in the policy to the contrary; and unless a policy so delivered is avoided by showing bad faith or collusion, it is enforceable. *Phœnix M. L. Ins. Co.* v. *Hinesley*, 75 Ind. 1.

If the insurance company has been credited with the premium in account by its agent, or if credit has been extended by the agent to the assured, or if it has, in fact, been paid to him, no doubt it is a sufficient payment to the company to support the policy. *Sheldon* v. *Atlantic, etc., Ins. Co.*, 26 N. Y. 460; *Life Ins. Co.* v. *Dunklee*, 16 Kans. 158; *Michael* v. *Nashville Ins. Co.*, 10 La. Ann. 737; *Taylor* v. *Merchants Fire Ins. Co.*, 9 How. 390; *Mowry* v. *Home Life Ins. Co.*, 9 R. I. 346; *New England M. L. Ins. Co.* v. *Hasbrook*, 32 Ind. 447; 1 Wood Fire Ins., sections 28–30; May Ins., sections 361–2–3.

"If the agent be authorized to receive the premium, an agreement between the assured and the agent that the latter will be responsible to the company for the amount, and hold the assured as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent." May Ins., section 360. *Sheldon* v. *Connecticut, etc., Ins. Co.*,

25 Conn. 207; *Home Ins. Co.* v. *Curtis*, 32 Mich. 402; *Willcuts* v. *Northwestern M. L. Ins. Co.*, 81 Ind. 300 (309), and cases cited.

It is fairly to be inferred from the pleadings that the agent agreed, that, upon receiving credit on his account due the assured, he would be responsible to the company for the amount of the premium. Having presumably credited the amount to his company at once, and having forwarded it according to his agreement in the usual course of business, the policy can not be avoided in the absence of fraud. For all that appears, the assured was fully justified in presuming that the agent was authorized to make the arrangement disclosed. We are not required to decide what the rights of the parties would have been in case there had been no delivery of the policy (*Hoffman* v. *John Hancock Mut. L. Ins. Co.*, 92 U. S. 161; *Insurance Co.* v. *Colt*, 20 Wall. 560), or in case the agent had failed to give the company credit and remit in the usual course. The demurrer to the reply was properly overruled.

The appellant contends, lastly, that a new trial should have been granted, because the finding is contrary to law and is not supported by the evidence.

This contention rests upon the fact that the plaintiffs alleged in their complaint that Sapp was the owner in fee simple of the property insured. The proof shows that prior to the issuance of the policy, Gilman, as executor of the estate of Reynolds, assuming to act under a power contained in the will of the testator, made a deed purporting to convey the premises on which the building insured was situate to Sapp. The appellant contends that the will did not authorize the executor to make the conveyance. This was a question, however, which the insurance company could not make. Sapp, having taken a conveyance, so far as appears, in good faith, and having gone into possession, claiming to be the fee simple owner, had an insurable interest in the property. So long as those interested in the execution of the will of Reynolds are content with the deed made by the executor,

the insurance company can make no question concerning the power of the executor in that regard. 1 Wood Fire Ins., section 274.

Judgment affirmed, with costs.

Filed Sept. 30, 1887.

No. 12,916.

A Coal-Float v. The City of Jeffersonville.

City.—*Ordinance.—Reasonableness of.—Legislative Authority.*—An ordinance can not be held to be unreasonable which is expressly authorized by the Legislature.

Same.—The power of a court to declare a city ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and where the same was passed under the supposed incidental power of the corporation merely.

Same.—*Lien on Water-Craft.—Wharfage.—Statute.*—Where the common council of a city passes an ordinance fixing the rate of wharfage to be paid by boats, etc., it is not necessary to the enforcement of a lien against a boat for delinquent wharfage that the ordinance should provide for such enforcement. When such delinquency occurs, the city may proceed under the provisions of section 5277, R. S. 1881, which fixes the lien, and have a judgment *in rem* against the boat for the amount due.

From the Clark Circuit Court.

J. H. Stotsenburg and *J. K. Marsh*, for appellant.

G. H. Voigt, for appellee.

Niblack, J.—The judgment appealed from in this case is based upon a proceeding in attachment instituted by the City of Jeffersonville against a coal-float, the name of which was unknown, and John Plotz, its owner, to recover the sum of $50, alleged to be due for wharfage.

The proceeding was commenced before the mayor of the city, where the plaintiff obtained judgment for the amount

demanded, and the coal-float was ordered to be sold to pay the judgment.

Upon an appeal to the circuit court, Plotz, on his own behalf, as well as that of the coal-float, moved to dismiss the action:

First. Because the ordinance requiring the payment of wharfage was an unreasonable, and hence an invalid, ordinance.

Second. Because the coal-float was a part of the wharf, and not a boat or craft within the meaning of the ordinance set out in the complaint.

Third. Because the ordinance by its terms created only a personal liability, and, therefore, did not provide for a lien upon boats or craft of any kind.

Fourth. Because, upon the facts stated in the complaint, no lien attached to the coal-float.

Fifth. Because a coal-float can not contract an indebtedness.

Sixth. Because there was no law authorizing the enforcement of a lien against a coal-float by attachment.

The court declining to sustain this motion, Plotz then moved to dismiss the attachment proceedings against the coal-float, upon the ground that the ordinance relied on for the collection of wharfage was unlawful and void, as previously claimed; but this motion was in like manner not sustained.

The court, after hearing the evidence, found that there was due the city as a balance on wharfage against the coal-float the sum of $13, and that the attachment proceedings ought to be sustained, and accordingly rendered a judgment for the sale of the coal-float and its furniture and apparel to pay the amount so found to be due and certain specified costs, but declined to award a personal judgment against Plotz.

Error is assigned upon the alleged insufficiency of the complaint, upon the overruling of the motions to dismiss the ac-

tion and the attachment proceedings respectively, and upon the refusal of the court to order a new trial.

The complaint represented that the city of Jeffersonville, on the 25th day of October, 1881, adopted an ordinance providing, amongst other things, that "all steamboats, barges, keel-boats, flat-boats, or other boats or rafts, coming to, or landing at, the wharves of said city, shall pay to said city for the use of said wharves the following sums, to wit: * * * * For every coal-float, used and owned by regular dealers in coal at said wharves, the sum of $200 per year, payable monthly, provided that no more space shall be occupied than the length of such float;" that John Plotz was, during the months of May, June and July, 1885, the owner of a coal-float, the name of which was unknown, attached to a wharf on the Ohio river within the corporate limits of said city, and was, during all that time, a regular dealer in coal, using said coal-float in the prosecution of his business as such dealer; that on the 3d day of August, 1885, which was after the indebtedness for wharfage for said months of May, June and July became due, and before the commencement of this action, Andrew J. Burlingame, wharfmaster of said city, demanded of the said John Plotz the sum of $50, the amount due for such wharfage, and payment was refused by him, the said Plotz. All of which was verified by the affidavit of Burlingame.

The objections to the complaint are, that the ordinance set out in it was, upon its face, an unreasonable, and, consequently, an invalid ordinance, and that, upon the facts alleged, no cause of action is shown against the coal-float, as it is an inanimate thing, and therefore incapable of contracting an indebtedness, and as no lien was expressly provided for in such a case by the ordinance.

As this proceeding was commenced before the mayor of a city, and as the amount involved did not exceed $50, this court would have no jurisdiction of this appeal were it not

that the avowed object in prosecuting it is to test the validity of the ordinance referred to in, and relied upon by, the complaint. R. S. 1881, section 632.

The power to adopt rules, regulations, by-laws and ordinances, not inconsistent with its charter, is inherent in every municipal corporation and is fully recognized by existing statutes of the State. R. S. 1881, section 3099; Dillon Munic. Corp., section 315. It is only requisite that such rules, regulations, by-laws or ordinances shall not be against common right, or palpably unreasonable, as applicable to the subjects to which they relate. *State, ex rel.*, v. *White*, 82 Ind. 278 (42 Am. R. 496); Dillon, *supra*, section 319; *Fertich* v. *Michener*, 111 Ind. 472.

The thirty-fourth subdivision of section 3106, R. S. 1881, confers upon cities the power "To establish and construct wharves, docks, piers, and basins; and to regulate landing places, and to fix the rates of landing, wharfage, and dockage on all public grounds belonging to such city. All claims for landing, wharfage and dockage, accruing to said city, shall be a lien upon the boat, vessel, or water-craft contracting the same; and after a demand made by the wharfmaster upon the owner or master, clerk, or consignee thereof, and refusal of payment, may be enforced by attachment before the mayor of said city, where the amount does not exceed one hundred dollars, in the same manner and to the same extent that liens on boats and other water-craft are now enforced under the general laws of this State, and all proceedings shall be conformable thereto as far as practicable."

Section 5277 of the general laws embraced in the Revised Statutes of 1881 provides that "All boats, vessels, and water-craft of every description, found in the waters of this State, including wharf-boats and floating warehouses used for the storing, receiving, and forwarding of freights, which are liable to be removed from place to place, at the pleasure of the owner or owners of the same, are liable"—*First.* For all debts contracted within this State, by the master, owner, agent,

clerk, or consignee thereof, on account of certain specified classes of things. *Second.* For all demands or damages arising out of transactions concerning certain enumerated classes of business. *Third.* For all injuries of a particular designated character.

Section 5278 declares all such debts, demands for damages, and claims for injuries to be a lien on all such boats, vessels or water-craft.

Section 5280 is as follows: "Any person aggrieved may have an action against such boat, vessel, or water-craft in the county where the same may be found, or against the owners thereof, to enforce any such lien. If the complaint in such action show the particulars of the demand, the amount due, and a demand made upon the owner, master, clerk, or consignee thereof, and refusal of payment, verified by the affidavit of the plaintiff or other person in his behalf, an order of attachment shall be issued by the clerk against the boat, vessel, or other water-craft, and the tackle and furniture thereof, which shall be directed, executed, and returned as an order of attachment in other cases."

As has been shown by so much of the thirty-fourth subdivision of section 3106 as we have set out as above, cities are expressly authorized not only to establish and construct wharves, docks, piers and basins, and to regulate landing places, but also to fix the rates of wharfage and dockage, as well as of landing.

No question is made upon the power of the Legislature to confer such an authority upon the cities of the State, and none could be successfully made, since the precedents for the exercise of such a power are both numerous and of long standing.

While the *reasonableness* of an ordinance is a question of law for the decision of the court, an ordinance can not be held to be *unreasonable* which is expressly authorized by the Legislature. The power of a court to declare an ordinance *unreasonable*, and therefore void, is practically restricted to

cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely. On that subject see, also, Dillon, *supra*, sections 319 and 328.

At section 357 Dillon says: "Charters not unfrequently confer upon the corporation the power 'to license and regulate' or to 'license, regulate, and tax,' certain avocations and employments, and to 'tax and restrain' or 'prohibit' exhibitions, shows, places of amusement, and the like, and unless there is some specific limitation on the authority of the Legislature in this respect, such provisions are constitutional."

The general principle thus announced is well sustained both by precedent and authority; and as there is no such limitation upon the authority of the Legislature in this State, the city of Jeffersonville is, and long has been, in full possession of the power to fix the rates of wharfage, as well as of landing, at its wharves. This fixing of rates is only the exercise of the power of taxation in a particular form, and is hence a power which the Legislature was, and still is, authorized to confer.

It follows that the city of Jeffersonville was expressly authorized to adopt the ordinance in question, and that, having adopted it, no question as to its reasonableness is involved at the present hearing. Angell & Ames Corp., section 357.

Having in view a merely literal construction of the first part of the second clause of the thirty-fourth subdivision of section 3106, a boat, vessel or water-craft may contract a debt for landing, wharfage and dockage; but construing the entire subdivision in connection with section 5280, the plain meaning is, that the claims for which a city may have a lien and an attachment against a boat, vessel or water-craft for landing, wharfage or dockage, are such as have been contracted on behalf of the boat, vessel or water-craft by the owner, master, clerk or consignee; but as the action for the enforcement of the lien is a proceeding *in rem*, it proceeds upon the

theory that the debt or claim was contracted by the boat, vessel or water-craft against which the attachment is directed; hence the statutory expression that the class of claims referred to "shall be a lien upon the boat, vessel or water-craft contracting the same."

It was not necessary that the ordinance relied on in this case should have declared claims for wharfage to be a lien on the vessel "contracting the same." The ordinance having fixed the rate, and the debt having been contracted, the law affixed the lien.

The complaint appears to us to have been sufficient under the sections of the statute to which we have referred, and our conclusion in that respect leads us to hold that the circuit court did not err, either in overruling the respective motions to dismiss the action and the attachment, or in refusing to grant a new trial, as practically the same questions were involved in these rulings.

The judgment is affirmed, with costs.

Filed Sept. 30, 1887.

112	21
130	180
112	21
132	330
112	21
166	566

No. 12,984.

HUTCHINSON *v.* TRAUERMAN.

EXECUTION.—*Proceedings Supplementary.—Pleading.—Method of Testing Sufficiency of Affidavit.—Motion to Quash.—Practice.*—In a proceeding supplementary to execution, the statutory methods of testing the sufficiency of the order and affidavit, viz., by demurrer, motion to dismiss or motion to strike out, must be pursued, and a motion to quash the writ and order, not being authorized by the statute, should be overruled.

SAME.—*Civil Action.—Amendment of Affidavit.*—A proceeding supplementary to execution is a civil action, and the modes of procedure and rules of practice fixed by the code in civil actions are applicable to such proceeding, except where the statute on that subject has prescribed a different procedure and practice. Where, in such a proceeding, a demurrer has

been sustained to the original affidavit, the plaintiff may be allowed to amend and proceed as in other civil actions.

SAME.—*Special Finding of Facts and Conclusions of Law.—Practice.*—Upon the hearing of such a proceeding, the statute does not contemplate that either party may require the trial court to make a special finding of facts therein and state its conclusions of law thereon.

SUPREME COURT.—*Practice.—Reversal of Judgment on Evidence.*—Where the evidence does not sustain, or tend to sustain, the decision of the trial court on every material issue, the judgment will be reversed.

From the Allen Superior Court.

W. G. Colerick, P. B. Colerick and *J. M. Robinson*, for appellant.

M. L. Graff, for appellee.

HOWK, J.—This is a proceeding supplementary to execution, instituted in the court below by appellee, Trauerman, against Thomas J. Hutchinson, Mary A. Hutchinson and Theodore Hibeler. The hearing of the cause by the court resulted in a general finding for appellee as against the appellant, Mary A. Hutchinson, and that she had in her possession the sum of $120 in money belonging to said Thomas J. Hutchinson, the execution defendant, which he unlawfully and unjustly refused to apply to the satisfaction of the judgment mentioned in such proceeding; and as to the defendant Hibeler, the court found that he had no property in his possession belonging to said Thomas J. Hutchinson and was not indebted to him. Upon its finding herein, the court ordered and adjudged that appellant, Mary A. Hutchinson, should pay into court said sum of $120 to be applied to the satisfaction of said execution and judgment, and that appellee recover of said Thomas J. Hutchinson his costs herein expended.

From such order and judgment, Mary A. Hutchinson alone has appealed to this court and has here assigned a number of errors, and these errors we will consider in the order of their assignment, and decide the questions thereby presented.

1. The first error of which appellant complains is the overruling of her motion to quash the writ and order herein. This motion was in writing, upon the special appearance of the appellant herein, for the reason assigned in such motion "that, on the 24th day of June, 1885, the said plaintiff filed his affidavit and complaint in said cause, and that said writ issued upon an order of said court made at said time; that at the time of filing said complaint and the making of said order, and the issuing and service of said writ, said court was in regular session, and has been continuously since in regular session up to the 10th of July, 1885; that said writ issued on the 25th day of June, 1885, and was made returnable on the 7th day of July, 1885, and was served June 25th, 1885; and that there is no sufficient affidavit to authorize it." It is manifest, from the reason assigned in this motion, that its only object and purpose was to question "the sufficiency of the order and of the affidavit first filed by the plaintiff" herein. Ordinarily, no doubt, where a writ or order can only be issued upon an affidavit or verified complaint, a motion to quash such writ or order will properly call in question the sufficiency of such affidavit or complaint. *McGlennan* v. *Margowski*, 90 Ind. 150; *Milligan* v. *State, ex rel.*, 97 Ind. 355.

This is so in all such cases, we think, except where the statute authorizing and regulating the proceeding prescribes a different mode for testing "the sufficiency of the order and of the affidavit." In this latter case the statutory mode is, of course, the only mode which can be safely pursued, or which will properly present the question. *Storms* v. *Stevens*, 104 Ind. 46, and cases cited. Our statute authorizing and regulating proceedings supplementary to execution, after declaring that the proceedings in such a case "shall be summary, without further pleadings," expressly provides that "the sufficiency of the order and of the affidavit first filed by the plaintiff may be tested by demurrer or motion to dismiss or strike out the same." Section 822, R. S. 1881. It is cer-

tain, therefore, as it seems to us, that appellant's motion to quash the writ and order herein was not authorized by our statute; that such motion did not test the sufficiency of the affidavit first filed or of the order, and, therefore, that there was no available error in overruling such motion, even if such order or such affidavit were clearly insufficient.

2. It is next claimed on behalf of appellant, that the trial court erred in overruling the motion "to strike out the amended complaint and affidavit herein." This motion was in writing, and the only cause assigned therein for striking out such amended pleadings was, "that the law does not warrant the filing of the same, and that the court has no jurisdiction of the same." The motion to strike out, we think, was correctly overruled. It is settled by our decisions that a proceeding supplementary to execution, such as the case in hand, is a civil action. *Burkett* v. *Holman*, 104 Ind. 6; *Burkett* v. *Bowen*, 104 Ind. 184; *Bipus* v. *Deer*, 106 Ind. 135. The modes of procedure and rules of practice prescribed by our civil code in civil actions, therefore, are all applicable in a proceeding supplementary to execution, except where the statute authorizing and regulating such proceedings has expressly, or by fair construction, prescribed a different mode of procedure or rule of practice therein. The provisions of our statute in regard to proceedings supplementary to execution (sections 815 to 822 inclusive, R. S. 1881) are wholly silent in respect to the amendment of the plaintiff's affidavit or verified complaint in such a proceeding. This being so, we are of opinion that the provisions of section 394, R. S. 1881, were applicable to the case in hand, that it was competent for the court below to allow the appellee to amend his affidavit or complaint herein, and that the motion to strike out such amended pleading was, therefore, correctly overruled. *Crume* v. *Wilson*, 104 Ind. 583.

3. The third error, of which appellant complains, is the overruling of her motion for final judgment in her favor on sustaining the demurrer to the original complaint herein.

The statute governing proceedings supplementary to execution, as we have seen, provides that the sufficiency of the original affidavit may be tested by demurrer, but it does not provide what action the court shall take, if it shall sustain such demurrer and hold such affidavit to be insufficient. In such a case we think it was competent for the court, under the provisions of section 342, R. S. 1881, to allow the plaintiff to amend his original affidavit herein. There was no error, therefore, in the overruling of the motion for final judgment upon the sustaining of the demurrer to the original complaint herein.

4. It is next assigned as error, that the trial court neglected and refused to make a special finding of the facts and state its conclusions of law thereon, upon the proper request of the defendants herein. We are of opinion that there is no available error in this action of the court. Construing together all the provisions of our statute authorizing and regulating proceedings supplementary to execution, and considering the summary character of such proceedings, it must be held, we think, that it never was intended nor contemplated that, upon the hearing of such a proceeding, either party might require the trial court to make a special finding of facts therein and state its conclusions of law thereon. The statute provides that such supplementary proceedings may be instituted, heard and determined, and the proper orders made and enforced, by and before the judge of the court, in vacation, as well as by and before the court in session. Sections 815 to 822, inclusive, R. S. 1881. Our civil code nowhere authorizes or requires the judge of a court, in vacation, in any suit or proceeding which he may hear and determine in vacation, at the request of any party, to make a special finding of the facts and thereon state his conclusions of law. We are of opinion, therefore, that the provisions of our civil code requiring the special finding of facts and the statement of conclusions of law thereon, in an ordinary civil action, are not and were not intended to be applicable to proceed-

ings supplementary to execution, such as the proceedings under consideration. Upon the hearing of such proceedings the action of the court or of the judge in vacation "shall be summary." *McGlennan* v. *Margowski*, 90 Ind. 150, and cases there cited.

5. Finally, appellant's counsel earnestly insist that the finding and order of the trial court herein were not sustained by sufficient evidence. We have carefully examined and considered all the evidence appearing in the record, and we have reached the conclusion that this last point is well made and must be sustained. Without setting out or commenting on the evidence, we are of opinion that it does not sustain, nor tend to sustain, the decision and order of the court below on every material point in the case. In such a case, as we have often held, the judgment below must be reversed. *Butterfield* v. *Trittipo*, 67 Ind. 338; *Kitch* v. *Schoenell*, 80 Ind. 74; *Roby* v. *Pipher*, 109 Ind. 345.

The judgment is reversed, with costs, and the cause is remanded for a new trial or hearing, and for further proceedings not inconsistent with this opinion.

ZOLLARS, C. J., took no part in the decision of this cause.

Filed Oct. 15, 1887.

112	26
112	597
113	546
113	563
113	571
114	34
114	478
118	294
119	589
120	551
112	26
144	130
112	26
148	195
112	26
163	635

No. 12,826.

THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY *v.* CARPER.

NEGLIGENCE.—*Railroad.—Carrier.—Passenger Taking Wrong Train by Mistake.*—Where a person has bought a ticket over a railroad, and by mistake takes passage on the wrong train, he is a passenger so far as to entitle him to protection against the negligence of the company.

SAME.—*Directions of Conductor to Passenger.—Contributory Negligence.*—Where

the directions of the conductor of a passenger train are within the scope of his authority, and obedience to them will not expose a passenger to known or apparent danger which a prudent man would not incur, obedience by the passenger is not contributory negligence, although it may result in bringing injury upon him.

SAME.—*Principal and Agent.—Authority of Conductor.—When Terminated.—Responsibility of Carrier for Act of Agent.*—Where a passenger enters a wrong train through a mistake of his own, the authority of the conductor as the representative of the carrier terminates when a safe alighting place is provided, and the passenger has voluntarily left the train in safety. In such case the carrier is not responsible for any advice or directions given by a conductor to the passenger after he has left the train, and is not liable for any injury received by him while acting upon such directions or advice, however erroneous, negligent or misleading the same may have been.

From the Fayette Circuit Court.

R. D. Marshall and *W. C. Forrey*, for appellant.

B. F. Claypool, J. H. Claypool, J. S. Duncan, C. W. Smith and *J. R. Wilson*, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that his intestate bought a ticket at Connersville entitling him to a passage on the defendant's trains to Cincinnati, Ohio; that his intestate was a stranger in Connersville, unacquainted with the points of the compass at that city; that on the day he purchased his ticket he went to the appellant's depot, intending to take passage on its east-bound train, which, according to schedule time, passed Connersville at eight o'clock and forty-seven minutes P. M.; that the east and west-bound trains usually passed at that hour at Connersville; that the night on which the appellee's intestate intended to take passage was dark; that, at a short distance to the west of appellant's station, the track passed over a highway and a canal, upon an elevated trestle-work several hundred feet in length; that at a short distance west of the trestle-work there was a switch known as Salter's switch; that on the night on which the intestate intended to take passage for the east, the train from the west was behind time, and was ordered to wait at Salter's switch for the train from the east; that the latter

train was ordered to move forward and pass at that point; that the conductor of that train had notice of these orders; that on the arrival of the train from the east, the intestate, supposing it to be the east-bound train, entered it and immediately thereafter it departed; that shortly after the departure of the train the conductor informed him that he was on the wrong train, and stopped the train a short distance west of the trestle-work which spanned the canal and highway; that "he carelessly and negligently directed the deceased to get off, and at once to walk back over the railroad track to Connersville, informing him that if he, the deceased, did so" he would reach the station in time to take passage on the east-bound train; that at the time the conductor gave these directions he knew of the existence of the trestle-work, and that the east-bound train would in a very few minutes pass over that part of the track lying between the place where the deceased was directed to leave the train and the station at Connersville; that there was no highway or foot-passage between those points by which the deceased could return to the station except by passing along the railroad track; that the deceased was ignorant of the existence of the trestle-work, and of the fact that the east-bound train would soon pass over the trestle-work; that the deceased undertook to obey the directions of the conductor, and, without fault or negligence on his part, was struck and killed while walking along the track built upon the trestle-work, on his way to the station at Connersville.

Where a person has bought a ticket over a railroad, and, by mistake, takes passage on the wrong train, he is a passenger so far as to entitle him to protection against the negligence of the company. *Columbus, etc., R. W. Co.* v. *Powell*, 40 Ind. 37; Railway Accident Law, 215; *International, etc., R. R.* v. *Gilbert*, 22 A. & E. R. R. Cases, 405; 2 Wood Railway Law, 1047.

The deceased was, therefore, entitled to be treated as a passenger while on the train, and a high degree of practicable

care to protect him from injury was due to him from the carrier.

Where the directions of the conductor are within the scope of his authority, and obedience to them will not expose a passenger to known or to apparent danger which a prudent man would not incur, obedience by the passenger is not contributory negligence, although it may result in bringing injury upon him.

In *Pool* v. *Chicago, etc., R. W. Co.*, 53 Wis. 657, and 56 *Id.* 227, the doctrine was stated somewhat more broadly, and it was said, in speaking of the passenger: "He relied—and we think he had the right to rely—on the judgment of the person in charge of the car, presuming that by following his directions in the matter he would not expose himself to any unnecessary or unusual peril."

It was held in *Hanson* v. *Mansfield, etc., R. W. & Trans. Co.*, 38 La. Ann. 111 (58 Am. R. 162), that one who rides on the locomotive, under the direction of the "engineer or conductor," is not guilty of contributory negligence, and the court said: "It has also been frequently held, that taking an unusual place on a train, which ordinarily might be considered contributory negligence, can not be so regarded where the place is occupied by the direction or permission of the conductor."

We can not concur in this extreme view of the law. Our conclusion is, that a passenger may safely rely on the judgment of those placed in charge of the train, where it is not plainly open to his observation that reliance will expose him to danger that a prudent man would not incur, but that he can not rely on their judgment where it would expose him to a risk that a reasonably prudent man would not assume. An American author says: "If the danger is obvious, and such as a reasonable man would not have incurred, the passenger must not assume the risk." 2 Wood R. W. Law, 1121. It was said by this court in *Louisville, etc., R. R. Co.* v. *Kelly*, 92 Ind. 371 (47 Am. Rep. 149), that "Our own cases hold that passengers are warranted in obeying the

directions of the agents and servants of the carrier, unless such obedience leads to known danger which a prudent man would not encounter." This doctrine is supported by our own cases and by the great weight of authority. *Jeffersonville R. R. Co.* v. *Swift*, 26 Ind. 459; *Pennsylvania Co.* v. *Hoagland*, 78 Ind. 203; *Lake Erie, etc., R. W. Co.* v. *Fix*, 88 Ind. 381 (45 Am. Rep. 464); *Terre Haute, etc., R. R. Co.* v. *Buck*, 96 Ind. 346 (49 Am. R. 168); *Filer* v. *New York, etc., R. R. Co.*, 49 N. Y. 47; *Filer* v. *New York, etc., R. R. Co.*, 59 N. Y. 351; *St. Louis, etc., R. R. Co.* v. *Cantrell*, 37 Ark. 519 (40 Am. Rep. 105); *Fowler* v. *Baltimore, etc., R. R. Co.*, 18 West Va. 579; *Hickey* v. *Boston, etc., R. R. Co.*, 14 Allen, 429; *Railroad Co.* v. *Aspell*, 23 Pa. St. 147 (62 Am. Dec. 323); *Philadelphia, etc., R. R. Co.* v. *Boyer*, 97 Pa. St. 91; *Indianapolis, etc., R. R. Co.* v. *Horst*, 93 U. S. 291; *St. Louis, etc., R. W. Co.* v. *Person*, 4 S. W. Rep. 755; Beach Cont. Neg. 72; 2 Wood R. W. Law, 1121; Hutchinson Carriers, section 535.

Under the rule we have stated, the deceased can not be considered guilty of contributory negligence upon the case made by the complaint, for it is averred that he was ignorant of the danger to which the directions of the conductor exposed him, and was free from fault and negligence. As he was free from fault and ignorant of danger, and as the danger was not open to his observation, he can not be regarded as having done what a reasonably prudent man would not have done in relying upon the directions of the appellant's conductor, if the directions were given by the conductor while acting within the line of his duty.

We come now to a question of much more difficulty, and that is, were the directions of the conductor given while acting within the scope of his authority? It is an elementary rule that a principal is not bound by the acts of his agent, unless they are performed within the scope of the authority actually or ostensibly conferred upon him. This rule ap-

plies, of course, to railroad corporations as well as to natural persons. Railway Accident Law, 99.

The conductor of a passenger train is undoubtedly clothed with extensive authority. In discussing the subject Chief Justice RYAN said: "Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these officers; and that, as to passengers on board, they are to be considered as the corporation itself." *Bass* v. *Chicago, etc., R. W. Co.*, 20 Wis. 450. Speaking for the court, CAMPBELL, J., said of the conductor and the company: "He represents them in the whole management of his train." It was also said: "He occupies the same position as the master of a ship." *Great Western R. W. Co.* v. *Miller*, 19 Mich. 305.

In *Chicago, etc., R. W. Co.* v. *Ross*, 112 U. S. 377, the court declared that the conductor represents the corporation, and said: "If such a conductor does not represent the company, then the train is operated without any representative of its owner."

Discussing the general subject, the Supreme Court of Pennsylvania said: "And where there are no prescript rules, the usage or common law of railroads makes the conductor the responsible agent in the conduct of the train. It is of the last importance to all interests, both public and private, that the law should define, with precision, to whom the custody and responsibility of a train of cars attaches. We hold that, from the beginning to the end of the trip, whatever the motive power employed, the conductor, and nobody else, is the responsible party in possession of the train." *Rauch* v. *Lloyd*, 31 Pa. St. 358.

There are many authorities which assert doctrines sub-

stantially the same as those declared in the cases from which we have quoted. *Columbus, etc., R. W. Co.* v. *Powell, supra; Terre Haute, etc., R. R. Co.* v. *McMurray*, 98 Ind. 358 (49 Am. R. 752); 1 Wood Railway Law, 449, and cases cited; Thompson Carriers, 369.

But, broad as the authority of the conductor is, it is by no means unlimited; on the contrary, it is limited to the management and control of the train committed to his care. He has authority to control the train in its movements, and it is his duty to take measures to preserve passengers from injury while getting on the train, while they are on it, and while they are alighting. In the discharge of this duty he must, as the representative of the company, exercise a high degree of care and diligence; but when the relation of carrier and passenger terminates, the authority of the conductor, as the representative of the carrier, is at end. His authority ceases when the passenger has safely alighted from the train.

The company does not vest him with either apparent or actual authority beyond such as is necessary for the proper care of the persons and property placed in his charge and control. When the person who enters as a passenger has finally left the train, the conductor no longer stands to him as the representative of the carrier. His representative character does not extend to acts done after the relation of passenger and carrier has been severed. It is his duty to afford the passenger whom he directs to leave his train a safe alighting place, but he is not bound, as the representative of the company, to look after the passenger after he has left the train. It may be that where a passenger leaves a train, and in making his way from the station is injured by the negligence of other servants, the company is liable. *Imhoff* v. *Chicago, etc., R. R. Co.*, 22 Wis. 681; *Gaynor* v. *Old Colony, etc., R. W. Co.*, 100 Mass. 208; *Indiana Central R. W. Co.* v. *Hudelson*, 13 Ind. 325. But, even in such a case, it is doubtful whether the liability is that of a carrier to a passenger; if, however, it were conceded that the liability is

of that character, still the concession would not avail the appellee, for the question here is not what other agents of the company did; the question is, what was done by the conductor, and was it within the scope of his authority? If the conductor had authority to give the deceased directions as to the course he should pursue after he left the train, then, upon the facts alleged in the complaint, the appellant may, perhaps, be liable; but if the conductor had no authority to give such directions, then there can be no liability on the part of the appellant. It is not for the negligence of any other of the appellant's servants that a recovery is sought; for the negligence of the conductor is stated as the sole cause of action, and for that negligence the appellant is not liable unless he was, at the time, acting as its agent and within the line of his duty.

Our judgment upon this point is, that where a passenger enters a wrong train, through a mistake of his own, the authority of the conductor as the representative of the carrier terminates when a safe alighting place is provided, and the passenger has left the train in safety, and that it does not extend so far as to authorize the conductor to direct the passenger what course he shall pursue after leaving the train. If the conductor had directed the deceased to walk ten or twenty miles it would hardly be contended that the corporation was responsible for such a direction, and we can not perceive that the principle is different whether the distance be long or short. A passenger has no right to assume that the carrier has invested the conductor with authority to direct him to travel back to a station where he entered a train by mistake, for the conductor is neither actually nor ostensibly clothed with any such authority. If the conductor had directed the deceased to go to a hotel, or had directed him to walk back upon a wagon road, he certainly would not have been acting in the line of his duty, and we can not discern any difference between such cases and the one under exami-

nation, for the direction to go back upon the track can not change the legal features of the case. If the conductor had refused to carry the deceased to a regular station, or had compelled him to leave the train, an essentially different question would have faced us; but here the passenger left the train without compulsion and undertook to rectify his mistake by making his way back to the station, so that the case turns upon the question whether the instructions given by the conductor as to the course the deceased should pursue after leaving the train were within the line of his duty. It is not the theory of the complaint that the conductor put the deceased off the train at an improper place; the case is not, therefore, controlled by the authorities upon that general subject. Nor is it the theory of the complaint that the conductor was guilty of negligence in directing the deceased to alight at an unsafe place, so that the case is entirely unlike that of a conductor directing a passenger to step from one train to another, or to alight upon a defective or unsafe platform. The classes of cases mentioned, and their kindred, are therefore excluded from our consideration and decision.

Counsel for the appellee dispose of the question whether the direction to the intestate to walk back to the station was within the line of the conductor's duty, by asserting that it is not an open question in Indiana, and refer us to the cases of *Carter* v. *Louisville, etc., R. W. Co.*, 98 Ind. 552 (49 Am. R. 780); *Evansville, etc., R. R. Co.* v. *McKee*, 99 Ind. 519 (50 Am. R. 102); *Terre Haute, etc., R. R. Co.* v. *Graham*, 46 Ind. 239; *Terre Haute, etc., R. R. Co.* v. *Fitzgerald*, 47 Ind. 79; *Indianapolis, etc., R. W. Co.* v. *Anthony*, 43 Ind. 183; *Jeffersonville R. R. Co.* v. *Rogers*, 38 Ind. 116 (10 Am. R. 103); *Pennsylvania Co.* v. *Hoagland*, 78 Ind. 203; *Columbus, etc., R. W. Co.* v. *Powell*, 40 Ind. 37; *Great Western R. W. Co.* v. *Miller*, 19 Mich. 305; *Bass* v. *Chicago, etc., R. W. Co.*, 36 Wis. 450 (17 Am. R. 495).

But these cases do not meet the question which controls here, for they do no more than assert that for a wrong of an

agent, whether wilful or negligent, committed within the line of his duty, the corporation is responsible, and that, in managing the train, the conductor is the agent of the railroad company. If it were granted that the act of directing a passenger what course to pursue after leaving a train is within the line of the conductor's duty, then the path of the appellee would be a smooth one, traversing solid ground; but the path is rugged and uncertain, because the assumption which is taken for granted—that is, that the act of the conductor was within the line of his employment—is the proposition which must be proved to make progress to a recovery possible. If it can be assumed that a railroad company actually or ostensibly invests its conductor with authority to direct passengers who by mistake enter the wrong train what route they shall take back to a station where they can rectify their mistake, then these authorities might justly be regarded as of controlling force; but, until the assumption which lies at the foundation of appellee's theory is established, these authorities are irrelevant and inapplicable.

One great reason why a passenger is justified in obeying the directions of a conductor is because the conductor is entitled to exact obedience. His directions are in the nature of commands or requirements; he may, indeed, put them in that form; it is, therefore, most reasonable that a passenger should have a right to rely on them when they are of that nature. The directions given by the conductor in this case are not of that nature, for it is perfectly obvious that he could not have required or commanded the deceased to take any particular route back to the station. It is not to be assumed that conductors have authority to bind the company by general directions, which are more in the nature of advice and information than of requirements or commands, as to what a passenger shall do after he leaves the train. There is an essential difference between a direction in the nature of a requirement and a direction in the nature of advice or information, as is strikingly illustrated by the cases of *Vi-*

mont v. *Chicago, etc., R. R. Co.*, 28 Am. & Eng. R. R. Cases, 210, and *Jeffersonville R. R. Co.* v. *Swift*, 26 Ind. 459. It is clear to our minds that, upon principle, a railroad company is not responsible for directions in the nature of information or advice, given to a passenger who, through his own mistake, has entered the wrong train, as to what course he shall pursue after leaving the train. This is so because the company does not, either actually or ostensibly, confer upon the conductor authority to give directions of that character to passengers who have entered its trains by mistake not caused by any negligence on its part.

Appellant's counsel dispose of the question by saying: "It was not an opinion given or an act done within the scope of his employment or authority, but a friendly act on the part of the conductor toward the person who had taken the wrong train without any fault or negligence on the part of the conductor." The only authorities cited are the cases of *Louisville, etc., R. W. Co.* v. *Boland*, 53 Ind. 398; *Cincinnati, etc., R. R. Co.* v. *Eaton*, 53 Ind. 307; and *Evansville, etc., R. R. Co.* v. *Dexter*, 24 Ind. 411. But, as counsel for the appellee justly say, "Not one of these cases bears even remotely upon the point to which it is cited."

Authorities upon the general question are very abundant, but upon the precise phase of the question here presented it is far otherwise. The case of *International, etc., R. R. Co.* v. *Gilbert*, 64 Texas, 536 (22 Am. & Eng. R. R. Cases, 405), in some of its features resembles the present case; but in that case the direction given by the conductor was clearly within the line of his duty, because it was made to the passenger while on the train, and was a direction to her to remain on it. The difference between the two cases is obvious, for here the direction was as to what the passenger should do after he had left the train.

In *Chance* v. *St. Louis, etc., R. W. Co.*, 10 Mo. App. 351, it was held that a brakeman charged with the duty of directing passengers where to leave the cars had authority to bind

the company by directing the passenger to take a prescribed way from the train, and in support of this doctrine the cases of *McDonald* v. *Chicago, etc., R. R. Co.*, 26 Iowa, 124, 145, and *Allender* v. *Chicago, etc., R. R. Co.*, 43 Iowa, 276, were cited. That case, however, stands upon the rule that carriers are bound to provide safe alighting places and are bound by the directions of their employees respecting such places. That case is, therefore, far from holding that directions as to the course to be taken after the passenger has safely alighted are within the line of a conductor's duty. There is some resemblance between this case and that of *Hulbert* v. *New York Central R. R. Co.*, 40 N. Y. 145, but the court in its opinion attached no importance to the directions of the conductor, and held the company liable on the ground of a negligent breach of duty in failing to make safe the place where passengers entered and left its trains. We do not deem it necessary to comment upon the cases which hold the acts of an agent not to be within his duty, but content ourselves with referring to a few of them and to the text-books where others may be found: *Gilliam* v. *South and North Ala. R. R. Co.*, 70 Ala. 268; *Nunn* v. *Georgia Railroad*, 71 Ga. 710 (51 Am. Rep. 284); *Sevier* v. *Vicksburg, etc., R. R. Co.*, 61 Miss. 8 (48 Am. Rep. 74); 2 Wood R. W. Law, 1213.

The complaint can not be upheld unless it be adjudged that the conductor was not only in the service of the company, but that his instructions or directions were given while he was acting for the company within the line of his duty. If he was not acting for the company and within the line of his duty, the company would not be liable even though he was in its service and had committed a wilful tort; but it is not the theory of the complaint that he committed such a tort, for there is no averment that the deceased was compelled or required to leave the train. We can not presume that a wrong was done by the conductor; on the contrary, facts must be alleged which warrant the conclusion of tortious conduct, for the presumption is with the defendant, and

not the plaintiff. *Chicago, etc., R. R. Co.* v. *Bills*, 104 Ind. 13; *Beauchamp* v. *International, etc., R. R. Co.*, 56 Texas, 239 (9 Am. & Eng. R. R. Cases, 307).

We must conclude that the deceased willingly left the train, for it is not otherwise averred; and so, too, we must conclude that there was no fault on the part of the conductor except that of negligently instructing the deceased where and how to go in order to take the east-bound train. The utmost that can be claimed for the complaint, with trace or tinge of justice, is that it shows that the conductor negligently gave instructions to the deceased as to what he should do and where he should go after alighting from the train.

The deceased left the train, we must assume, of his own free will, influenced, it may be, by the instructions of the conductor, but not constrained by them. Thus he severed the relation of passenger and conductor, and thus he passed from the conductor's supervision and control. We can not think that the latter's authority went with the deceased from the train, controlling and protecting him on his way to the station. If the conductor had instructed the deceased to take a carriage and pass over a turnpike the company would not, it seems to us, have been liable, even though the conductor may have known that there was a broken bridge or a pitfall on the road which the deceased could not avoid. Neither would there have been liability if the conductor had assumed to direct the deceased to take a foot-path which he knew no man could traverse in safety. The principle which rules the real case against the appellee is the same as that which governs the supposed cases, and that principle is, that the conductor, as the representative of the company, had neither actual nor ostensible authority to instruct one who had voluntarily left his train, what path or road he should walk to reach a distant station.

Judgment reversed.

Filed Oct. 11, 1887.

On Petition for a Rehearing.

Mitchell, C. J.—We have again examined this cause, and have also given attentive consideration to the able argument filed in support of the petition for a rehearing.

Recognizing the force of some of the points made in the argument, we nevertheless adhere confidently to the conclusions reached in the original opinion.

The case is, in some of its features, analogous in principle with *Lewis* v. *Flint, etc., R. W. Co.*, 54 Mich. 55, wherein, after full examination of the subject, it was held that the railway company incurred no liability.

The petition is overruled.

Filed Dec. 1, 1887.

112 39
120 337
112 39
126 14

No. 12,925.

Gale et al. v. Corey.

Promissory Note.—*Duty of Maker to Ascertain Proper Person to Whom Payment Should be Made.*—It is the duty of one having a matured outstanding note, in which no specific place of payment is appointed, to seek out the persons entitled to receive payment and discharge his debt, without waiting until those so entitled establish their right.

Same.—*Death of Payee.—Decedents' Estates.—Interest.—Abatement of.—Payment.*—Upon the death of the payee of a matured promissory note, interest will not abate thereon, although the maker has the money set apart with which to pay it, and although there is no administration on the estate, the minor heirs of the deceased are without guardians, and it is uncertain as to whether there is indebtedness against the estate. If the maker desires to escape the payment of interest he should cause letters of administration to issue, and pay the debt to the administrator.

SAME.—*Interest After Maturity.—Contract.*—Where a promissory note, by its terms, becomes due at a specified time subsequent to the death of a third party, who, during his lifetime, is to receive the interest thereon, and provides that on the death of such party interest shall cease, such latter stipulation will operate to relieve the maker from the payment of interest from the death of such party until the maturity of the note, after which interest is recoverable at the statutory rate.

From the Marion Superior Court.

E. Marsh and *W. W. Cook*, for appellants.

F. Rand and *J. M. Winters*, for appellee.

MITCHELL, J.—This was a suit by the appellants against Andrew F. Corey to recover upon three promissory notes. The only matter in controversy is the right of the appellants to recover interest on the notes after they matured.

The facts are embodied in a special finding of facts by the court. So far as material to be stated, they are as follows: On the 12th day of March, 1868, in order to effect a family settlement between himself and his brothers and sister, and presumably to adjust and equalize certain advancements made by his father, the appellee, Andrew F. Corey, executed the notes in suit, payable to Samuel Corey, William M. Corey, Amanda M. Guild and the heirs of John J. Corey, deceased. One note for six hundred dollars was payable one year after the death of John Corey and Mary Corey, his wife; the second, for a like amount, matured two years after the death of the persons last above named, and the third, for eight hundred dollars, fell due in three years after their death. There was a stipulation in each of the notes that interest should be payable annually at the rate of ten per cent. during the lives of John and Mary Corey, and each note contained a stipulation that interest was "to stop at the death of the said John and Mary Corey." John Corey died June 30th, 1872, and Mary, his wife, died on the 31st day of August following; so that the first note fell due August 31st, 1873, the second August 31st, 1874, and the third one year later. During the lives of John and Mary Corey, the

interest was paid according to the stipulation in the notes, and after their death, as the notes matured, the amounts due Samuel, William M. and the heirs of John J. Corey, deceased, respectively, were paid in full. The amount due Amanda M. Guild was not paid at maturity, for the reason that she died intestate in 1873, after the death of her father and mother, but before the first note fell due. She left surviving a husband and five children, who succeeded to her rights in the maturing notes. The finding does not disclose the ages of the children, but it appears that some of them were minors at the time of their mother's death, and some of them continued in their minority at the beginning of this suit in 1885. Amanda M. lived and died in Hancock county. She left no debts, and there was, consequently, no administration of her estate, but the appellee, who resided in Marion county, did not know whether her estate was indebted or not. In 1883, Horace Guild, the surviving husband of Amanda M., died intestate. His estate was settled in due course of law. In 1884, Mary M., a married daughter of Amanda M. and Horace Guild, died, leaving a surviving husband as her only heir. She left no debts, and there was no administration of her estate. Franklin Steele was afterwards appointed guardian of the persons and estates of Annie and Jesse, minor heirs of Amanda M. and Horace Guild. So far as appears, there had been no guardian for the minors prior to this appointment.

The notes in suit were secured by a duly recorded mortgage covering real estate, owned by the defendant, situate in Marion county. It does not appear that any proceedings had been taken to establish the right of the heirs of Amanda M. Guild to receive that portion of the money due them, or that any notice had ever been given to, or demand made upon, the defendant for payment. It is found that he had a sufficient amount of money constantly on hand to pay the amount due on the notes, and that ever since they matured he has been willing, able and anxious to pay them to any

person or persons legally authorized to receive the money, and enter satisfaction of the mortgage; but that he did not have the money separate and set apart from other money for the special purpose of paying the notes.

The appellee appeared without process upon the filing of the complaint, and with his answer tendered to and deposited five hundred dollars with the court, which is found to be the full amount due, unless the plaintiffs are entitled to recover interest.

As conclusions of law, the court stated that the plaintiffs were entitled to recover the principal, but that they were not entitled to recover interest or costs. Judgment was given accordingly, over the appellants' exceptions to the conclusions of law stated.

In support of the conclusions stated by the court, it is claimed that, because the appellee was constantly ready and able to pay the money to any person or persons who would establish a right to receive it and release the mortgage, and because the appellants failed in any manner to establish such right, interest is not recoverable. It is suggested, moreover, that the stipulation contained in the notes, to the effect that interest should stop after the death of John and Mary Corey, prevented the recovery of interest after the maturity of the notes.

By the terms of the contract no interest was provided for as between the payees and maker of the notes. As between them the notes matured and were payable in one, two and three years, respectively, after the death of John and Mary Corey, without interest. The interest reserved was for the benefit of, and was payable annually at the rate of ten per cent. to, the father and mother during their joint lives, and to the survivor, upon the death of either, during his or her life. Upon the death of the survivor, and until each note matured, interest was suspended by an express stipulation that interest should stop after their death.

This last stipulation can not, however, be construed so as

to effect a suspension of interest, in case the amounts due were voluntarily withheld from the persons entitled thereto after the maturity of the notes.

Interest on the loan or forbearance of money, goods, or things in action, accrues and is ordinarily recoverable by force of the statute, and not according to the ancient common law, which made it both unlawful and a crime to take interest. *Frazer* v. *Boss*, 66 Ind. 1.

Section 5200, R. S. 1881, provides, among other things, that "On money due on any instrument in writing, * * * interest shall be allowed at the rate of six dollars a year on one hundred dollars."

After the time stipulated for payment the amount due on each of the several notes was money due upon an instrument in writing, and in the absence of any contract rate having been fixed between the payees and maker, the statute required the allowance of six per cent. interest from the time the principal debt ought to have been paid, unless, from some cause which the appellee could not control, the right to make payment was suspended by law. *City of Jeffersonville* v. *Patterson*, 26 Ind. 15 (89 Am. Dec. 448); *Kellenberger* v. *Foreman*, 13 Ind. 475; *Brown* v. *Railway Pass. Assurance Co.*, 45 Mo. 221; *Knickerbocker Ins. Co.* v. *Gould*, 80 Ill. 388; 2 Daniel Neg. Insts., section 1513.

As there is no claim of a tender having been made until after the beginning of the suit, we need give the subject of abatement of interest by tender no further consideration.

The inquiry which remains is, did the facts that no administration was had upon the estate of Amanda M. Guild, and no guardian appointed for her minor heirs, or that the appellants did not by some method have their right to receive payment of the notes judicially established, suspend the right of the appellee, or legally restrain him from making payment of the notes, in such a sense as that, notwithstanding the statute, the interest abated?

We know of no principle or authority which justifies an

affirmative answer to this inquiry. The facts found by the court present the ordinary case of a debtor whose maturing obligation becomes, by the death of his creditor, part of the assets of a decedent's estate.

After the death of any one some brief period must necessarily intervene before letters of administration can issue. Whether letters be issued soon or late, or in case none at all should issue, no sufficient reason is thereby furnished for the abatement or suspension of interest upon written instruments which evidence money due the decedent's estate.

If it were conceded that interest can not be recovered which has accrued during a period in which a debtor, who has set the money apart to pay a matured debt, has been restrained by law from making payment (Sutherland Damages, 692, *et passim*), still the appellee's case would not be aided by the concession.

In view of statutes which authorize probate courts to issue letters of administration to any competent inhabitant of the county after a limited time, or in cases of delay to summarily, upon application, issue special letters, one who is indebted to an estate can suffer no substantial restraint from paying his debt if he wishes to exercise his rights. If delay results it must be on account of the non-action or neglect of the debtor to avail himself of the opportunities which the law affords, and for delay so occasioned a debtor may not avoid the payment of interest which is allowable by a positive statute.

If the appellee had doubts concerning the indebtedness of Mrs. Guild's estate, or whether he could safely pay his debt to the heirs, or if there was a question concerning who were legally entitled to receive payment as heirs, or if some of those entitled were minors, the appointment of an administrator, which he could have secured without cost or difficulty, would have solved all the doubts and removed all possible embarrassments. Having the power to act, he was not restrained. Supineness is not legal restraint. The case is

controlled in principle by the ruling in *Jones* v. *Detchon*, 91 Ind. 154.

It was the duty of the appellee, as it is the duty of all who have matured outstanding notes, in which no specific place of payment is appointed, to seek out the persons entitled to receive payment and discharge their debts, without waiting until those entitled have established their right. *King* v. *Finch*, 60 Ind. 420.

Having elected to wait until those entitled brought him into court, it must be held that he did so upon the condition that he pay interest as the statute provides.

As it is found that the estate of Amanda M. Guild was not indebted, there is no obstacle in the way of the heirs maintaining this suit. *Salter* v. *Salter*, 98 Ind. 522; *Holzman* v. *Hibben*, 100 Ind. 338; *Langsdale* v. *Woollen*, 99 Ind. 575.

The fact that the heirs were entitled to collect the amount due their deceased ancestor, without an administrator, did not, however, prevent the appellee, or any other person interested, from securing the appointment of an administrator if he had so desired.

The judgment is reversed, with costs, with directions to the court below to restate its conclusions of law in accordance with this opinion.

Filed Sept. 29, 1887.

On Petition for a Rehearing.

Mitchell, C. J.—It seems hardly necessary to say that the opinion given on the original hearing was not intended to, and does not, in any way affect the rule upon the subject of interest, as announced in *Kilgore* v. *Powers*, 5 Blackf. 22, and the later case of *Shaw* v. *Rigby*, 84 Ind. 375 (43 Am. R. 96). These cases hold, in effect, that the interest recoverable on a contract which stipulates the rate to be paid, is at the same rate after as before the maturity of the contract. Obviously, however, these cases do not hold, nor do any others that we are aware of, that in case the contract stipulates

that a sum of money shall be paid at a certain day, without interest, it shall continue to run indefinitely without interest until payment is enforced. After maturity the money is due upon an instrument in writing, and as there never had been, in the case supposed, any contract rate fixed, the statute fixes the rate at six per cent. This was decided, in effect, in the recent case of *Kopelke* v. *Kopelke*, *post*, p. 435.

In the present case there was no contract fixing the rate of interest between the maker and payees of the note. The stipulation that interest should stop after the death of John and Mary Corey was equivalent to a stipulation that from their death until the maturity of the notes, respectively, the notes should run without interest. After the maturity of the notes, the amount represented by each became money due upon an instrument in writing, and the interest recoverable was controlled by the statute.

Nothing further need be said, except to observe that the original opinion contains no intimation that the appellee might have procured himself to be appointed administrator of the estate in question. It remains true, nevertheless, that any one, no matter where he resides, who shows that he is interested in an estate, and that a necessity exists for the appointment of an administrator, so as to enable persons who are indebted to make payment, may secure the appointment of an administrator, if none has been appointed, and the statutory time for making application, by those having the preference, has expired.

The petition is overruled.

Filed Dec. 2, 1887.

119 47
119 98
119 949

112 47
108 306

No. 13,453.

The Pennsylvania Company v. Spaulding.

Railroad.—*Private Crossings.—Land-Owner Required to Keep Gates Closed.—Statute.—Negligence.*—Under the provisions of the act of April 8th, 1885, the land-owner for whose benefit a private farm crossing is maintained is required to keep the gates thereto closed, and the railroad company is exonerated from liability for damages resulting from his failure so to do, except where the injury or killing of animals is caused by the negligence of its servants.

Same.—*Cattle-Guards and Cross-Fences at Private Crossings not Required.*—A railroad company is not required to construct or maintain cattle-guards or cross-fences at a private farm crossing.

From the Bartholomew Circuit Court.

S. Stansifer, for appellant.

W. Dixon, for appellee.

Zollars, C. J.—Appellee's animal was killed upon appellant's railway by a train of its cars subsequent to the taking effect of the acts of 1885 in relation to fencing railways. Acts 1885, pp. 148, 224.

The animal strayed into a field of one Spurgin, whose land is separated by appellant's right of way. From there it passed to the railway through a gate at a private farm crossing, constructed for the use and benefit of Spurgin long before the passage of the acts of 1885. After the passage and taking effect of those acts the railway company neglected to keep the gates closed, although it had knowledge that they were left open by Spurgin. There being no wing or cross-fences from the gates to the railway track, and no cattle-guards across the track, the animal passed along the right of way or track for some fifty yards from the place of entry, and was there killed.

The foregoing facts are substantially those stated in appellee's complaint. In addition thereto, the manner in which

the railway company acquired its right of way in 1851 is stated, with the conclusion by the pleader that it was not acquired by condemnation. And so, in the answer by the railway company, the manner of acquiring the right of way is stated, substantially as in the complaint, with the pleader's conclusion that it was by condemnation proceedings.

Those matters seem to have been inserted in the pleadings upon the theory, on the part of appellee at least, that the manner in which the right of way was acquired might affect the liability of the railway.

No question of negligence in the killing of the animal is made. Appellee's case is based upon the ground that, as the gates were left open, the railway was not securely fenced, and that, therefore, the railway company is liable under the statutes in relation to fencing railways.

The liability of the railway company in this case, as in the recent case of *Hunt* v. *Lake Shore, etc., R. W. Co., post*, p. 69, is dependent upon the construction, scope and effect to be given to the acts of April 8th and 13th, 1885, *supra*.

Appellee contends:

1st. That the act of April 8th is applicable only where the private crossing is over a right of way acquired by "condemnation and appropriation."

2d. That the act is applicable only to crossings constructed since it took effect.

3d. That the purpose of the act was to enable adjacent land-owners, whose land is separated by the railway, to force a private crossing over the track, and to define the rights and liabilities of such land-owners and railway company as between them, and that it in no way affects the liabilities of railway companies to others than the persons for whose convenience such crossings may be constructed and maintained.

4th. That section five of the act of April 13th, 1885, is invalid, because not embraced in the title of the act.

Appellee's counsel further states his position thus: "Even if the acts of April 8th and 13th, 1885, as between the pub-

lic and railway company, relieve the company from all duty of keeping gates at private crossings closed, yet they do not repeal by any implication that portion of section 4031, R. S. 1881, under which it is the duty of railway companies to put cattle-guards at private crossings. * * * In other words, if the public have, by the acts of 1885, lost the right to look to both the railway company and the land-owner to keep gates at private crossings closed, they have not lost the right to demand of railway companies that cattle-guards shall be placed at such crossings."

With the exception of the last, the foregoing questions were made and argued in the case of *Hunt* v. *Lake Shore, etc., R. W. Co., supra.* Those questions were examined and decided in that case adversely to appellee's contention here. With the decision in that case we are satisfied, and need not repeat what was there said. It remains to examine the last position stated by counsel.

Without determining here whether or not any portion of former statutes in relation to fencing railways is in force notwithstanding the acts of 1885, it is sufficient for the purposes of this case to hold that it must be regarded as an assumption to say that it was the duty of railway companies, under section 4031, R. S. 1881, to construct and maintain cattle-guards at private farm crossings. Such an inference might be drawn from the case of *Grand Rapids, etc., R. R. Co.* v. *Jones*, 81 Ind. 523, but that case was explained and limited in the later case of *Wabash R. W. Co.* v. *Williamson*, 104 Ind. 154. It was there said: "What was said in that case [the Jones case], however, as to the necessity of having suitable cattle-pits at an established crossing of a railroad track, was rather of an abstract character, and had a proper reference more particularly to crossings of public highways, and to such other places on railroad tracks as are generally used as crossings, with the consent of the proper railroad companies." It was further said that in the Jones case the

liability of the railroad company was placed upon the ground that the gate at the crossing had not been kept closed.

In the case of *Bond* v. *Evansville, etc., R. R. Co.*, 100 Ind. 301, it was held, in effect, that, under the statutes prior to those of 1885, which included section 4031, R. S. 1881, no duty rested upon railway companies to construct wing fences and cattle-guards at private farm crossings.

Of course, to so place cattle-guards as to keep animals from the track at a private crossing would be to destroy the crossing for all purposes; and to place such guards across the track on either side of such crossing would be of no avail without fences from the guards to the fences on either side of the right of way. Such guards and fences would confine the crossing to a fixed limit, and prevent animals from straying along the track beyond it, but it is not at all certain that they would materially lessen the liability of injury or death to animals passing through the open gates.

It is altogether probable that on account of such guards and cross-fences, and the consequent want of means of escape along the side of the track, frightened animals, inside the open gates, might run upon the track at the crossing and be there injured or killed. However that might be, it is certain that, under the statutes prior to the acts of 1885, such guards and cross-fences would not exonerate the railway company from liability for the injury or death of animals going upon the track through gates at farm crossings.

In the case of *Indianapolis, etc., R. W. Co.* v. *Thomas*, 84 Ind. 194, the railway company sought to protect itself from liability by showing that it had placed cattle-guards at the private crossing. The defence was held to be insufficient.

The ground of liability in all the cases under those statutes was the failure of the railway company to maintain a secure fence, which included the keeping of gates at farm crossings closed, and not the want of cattle-guards or cross-fences.

Railway companies were held bound to keep their rights

of way securely fenced, and to thus keep animals from their tracks. If they neglected to do so, and animals passed to the track through insecure fences, or open gates at farm crossings, and were there injured or killed, the companies were held liable, except to the owner for whose benefit the crossing was maintained, without any reference to what may have been done in the way of placing cattle-guards or cross-fences at such crossings.

The duty to fence the right of way of railway companies has been, and now is, a purely statutory duty. Under former statutes, that duty resulted from the liability imposed by those statutes. The duty, therefore, extended to nothing except what was necessary to escape that liability. That being so, it would seem to follow that as the construction and maintenance of cattle-guards and cross-fences at private farm crossings would not exonerate railway companies from liability for the injury or killing of animals upon the track at such crossings, there was no duty resting upon them to construct or maintain such guards and fences.

By the statutes of 1885, Acts 1885, pp. 148, 224, the duty of fencing portions of their tracks, as therein specified, including all places where farm gates and crossings could be of service to any one, is positively enjoined upon railway companies. As we have said, that duty is purely a statutory duty. Railway companies might have escaped, and may still escape, the liability imposed by the several statutes, by performing the duty as the statutes required, and still require, and they could not, and can not, escape it in any other way.

The statutes have at no time required cattle-guards and cross-fences to be placed at private crossings. They have been enacted and construed upon the theory that gates at such crossings should be kept closed, so as to prevent the ingress of animals to the railway track; that when thus closed, there is no need of cattle-guards and cross-fences at such crossings; and that the construction and maintenance

of them by railway companies at such crossings will not exonerate them from whatever liability there may be for the injury or killing of animals that go upon the track through the open gates.

Under the acts of 1885 the duty on the part of railway companies to fence the specified portions of their tracks does not result from the liability prescribed, as under former statutes; but the liability is fixed for a neglect of the duty positively enjoined. Under former statutes there was no duty where there was no liability. Under the acts of 1885 there is no liability where there is no duty. As already stated, by those acts the duty of fencing their tracks as therein specified is positively enjoined upon railway companies. Those acts, however, transfer from the railway company to the land-owner, for whose convenience private farm crossings are maintained, the duty of keeping the gates at such crossings closed.

Section five of the act of April 13th, 1885, provides that all gates and bars at farm crossings shall, in the absence of a contract or agreement to the contrary, be constructed and maintained and kept closed by the owner of such crossing.

Sections two and three of the act of April 8th, 1885, make it the duty of the land-owner, for whose benefit the crossing is maintained, to keep the gates closed, and exonerate the railway company from liability, except where the injury or killing of animals is caused by the negligence of its servants.

Those acts no more require cattle-guards and cross-fences at private farm crossings than did the former statutes. It was not contemplated in the passage of the acts that gates at such crossings shall be left open, although the duty of keeping them closed is transferred from the railway company to the land-owner for whose benefit they may be maintained. If kept closed, as it is contemplated they shall be, there will be no need of cattle-guards and cross-fences at the crossing. If left open by the land-owner, such guards and fences would not prevent injury to animals upon the crossing. Cattle-

guards and cross-fences were held to be necessary under former statutes, and are required by the acts of 1885 to be placed at public roads and highway crossings. The reason of that requirement is, that at such open and public crossings there is no other way of preventing the ingress of animals to portions of the railroad not so crossed by the public, and required to be fenced. That reason can not obtain where a private crossing is enclosed by gates.

Upon the whole case our conclusion is, that upon the facts pleaded the railway company is not liable, and that, therefore, the court below erred in overruling appellant's demurrer to appellee's complaint.

The judgment is reversed, at appellee's costs, and the cause is remanded, with directions to the court below to sustain appellant's demurrer to the complaint.

Filed Oct. 12, 1887.

No. 12,947.

Barnard et al. v. Brown et al.

Execution.—*Exemption.—Property Exempt Unaffected by Execution Lien.*—Property exempt from execution is unaffected by execution liens, and may be sold or exchanged while writs of execution are in the hands of the proper officer.

Same.—*Sale of Real Estate Exempt.—Rights of Grantee.—Judgment.—Action.—Demand.*—Where one who has a right to the benefit of the exemption law owns property, real and personal, the aggregate value of which is less than $600, and sells the real estate, there being at the time judgments against him, which are liens on such real estate, he and his grantee may maintain a joint action to have the latter's title to such real estate quieted and freed from the apparent lien and encumbrance of such judgments, and the property of the former, owned at the time

112	53
113	359
114	197
115	137
116	392
118	113
120	96
121	307
112	53
133	560
112	53
135	356
112	53
146	592
112	53
148	438
149	212
149	214
112	53
156	86
112	53
167	647

of such conveyance, set off to him as exempt from execution, and no demand is necessary to the maintenance of such action.

From the Elkhart Circuit Court.

D. Zook, A. S. Zook and *J. M. Vanfleet*, for appellants.

H. D. Wilson and *S. J. North*, for appellees.

NIBLACK, J.—Complaint by Edward P. Brown and David Ullery against James Barnard, Bennett Lyman, James Sims, John S. Gould, Charles Fleetwood, George H. Wells, Meyer M. Jacobs, Lewis Heilbrenner, William D. Messenger, William Shearer and Samuel J. Shearer, to have certain apparent liens on real estate cancelled and discharged.

As causes of complaint it was alleged that, on the 17th day of November, 1883, the defendants James Barnard and Bennett Lyman recovered a judgment against the plaintiff Brown, before a justice of the peace of Elkhart county, for the sum of $9.10 and costs of suit, taxed at $5.91; that, on the 15th day of January, 1884, a duly certified transcript of said judgment was filed and properly recorded in the office of the clerk of the Elkhart Circuit Court; that, on the 26th day of November, 1883, the defendant Sims also recovered judgment before the same justice of the peace for the sum of $73.73 and costs of suit, taxed at $5.76; that, on the 15th day of January, 1884, a certified transcript of that judgment was also filed and recorded in the office of the said clerk of the Elkhart Circuit Court; that, on the 29th day of January, 1884, the defendants Gould, Fleetwood and Wells likewise recovered a judgment before the same justice against the plaintiff Brown for the sum of $68.95, a transcript of which said judgment was likewise filed and recorded in the same clerk's office on the 6th day of February, 1884; that, on the 31st day of January, 1884, the defendant Messenger recovered a judgment against the plaintiff Brown before the same justice, for a sum of money not specifically named, a transcript of which judgment was in like manner filed and recorded in the same clerk's office; that, on said 31st day of

January, 1884, the defendants Jacobs and Heilbrenner also recovered a judgment against the plaintiff Brown before the same justice, for the sum of $32.45, a transcript of which judgment was, also, on the 6th day of February, 1884, filed and recorded in the same clerk's office; that, on the aforesaid 31st day of January, 1884, the defendants Shearer and Shearer likewise recovered a judgment before the same justice against the plaintiff Brown for $41.82, a transcript of which was likewise filed and recorded in the same clerk's office on said 6th day of February, 1884; that at and prior to the times of filing the several transcripts of said judgments, respectively, the plaintiff Brown was the owner of a certain lot in the town of Nappanee, in said county of Elkhart, on which there existed two mortgages, amounting to the aggregate sum of $470; that said Brown at the time owned personal property of the value of $223; that said lot, when valued subject to said mortgages, and said personal property together amounted to less than $600; that said Brown, being unable to take up and discharge said mortgages, and being desirous of saving the loss and expense of a foreclosure and sale under the same, sold said lot to his co-plaintiff, Ullery, on the 13th day of February, 1884, for the sum of $800, and that, on that day, together with his wife, conveyed the same by warranty deed to him, the said Ullery; that out of, and as a part of, said purchase-money the said Ullery was to, and did, pay off said mortgages; that for the remainder of said purchase-money—that is to say, for the sum of $315—he executed his promissory note to the said Brown; that the said Brown was then, and for the preceding four years had been, a *bona fide* resident and householder of Elkhart county, and was then, as well as at the time said judgments were rendered against him, entitled to have an amount of property not exceeding in value the sum of $600 as exempt from execution; that, on the 20th day of November, 1883, the defendants Barnard and Lyman caused an execution to be issued on the judgment obtained by them, as above stated,

and that on the 22d day of said month of November the said Brown filed a schedule of his property with the constable holding said execution, and asked to have the property therein described set off to him as exempt from sale on such execution; that, on the 6th day of December, 1883, the defendant Sims procured an execution to be issued on the judgment obtained by him, and caused the same to be delivered to a constable for service, and that, on the 29th day of said month of December, the said Brown filed with the constable a schedule of his property, both real and personal, and asked that said property be set off to him as exempt from such execution.

Copies of both of said schedules were filed with, and made a part of, the complaint.

A schedule purporting to contain a list of all the property owned by Brown at the time of the commencement of this suit, was also filed with, and made a part of, the complaint. But there was no averment as to the total value of the property described in any one of the schedules.

As a conclusion, the complaint demanded that the property described in the last named schedule should be ordered to be set apart to Brown as exempt from execution; that the liens seemingly created by the filing and recording of the transcripts of judgments, as herein set forth, upon the lot so sold by Brown to Ullery, be decreed to be cancelled, and inoperative and void as against said lot; that Ullery's title should be quieted, and that the plaintiffs might have all other proper relief.

The defendants demurred severally to the complaint, upon the ground that the facts alleged by it were insufficient to constitute a cause of action against any one of them, but their demurrer was overruled as to all. They then answered in denial, and the court, after hearing the evidence, came to the conclusion that all the material facts alleged in the complaint were true; that Brown was entitled to have all the property owned by him at the time he conveyed the lot in

question exempted from execution; that Ullery was entitled to hold the lot in controversy free from any encumbrances by reason of the matters stated in the complaint, and decreed accordingly.

Error is assigned only upon the overruling of the demurrer to the complaint.

The objections to the complaint are:

First. That it did not aver the value of Brown's real estate at any time.

Second. That it did not allege that Brown had no other real estate besides the lot sold to Ullery.

Third. That it did not show that Brown had no other real estate at the time the transcripts were filed.

Fourth. That it did not allege that the defendants had ever issued executions on their judgments, or that they had ever attempted or threatened to enforce their judgments against the lot in question, or that they even knew of the existence of the lot.

Fifth. That it did not state the value of Brown's personal property at the time of filing the complaint.

Sixth. That it did not assert a demand and a refusal by the defendants to relinquish all claim against the lot conveyed to Ullery.

This proceeding was, in some of its features, a novel one, but it was undoubtedly within the power of the circuit court to grant the relief demanded if the facts relied on were sufficiently well pleaded to justify it in doing so. If the object sought had been simply to have an amount of property, not exceeding in value the sum of $600, set off to Brown as exempt from execution, it might have been well objected that another and a different method of proceeding had been expressly provided, and one to which Ullery was not a proper party; but the purpose had in view in this case was much more comprehensive in its scope. Its claim for relief rested upon equitable principles recognized, but not declared, by statute.

The chief and controlling purpose was to have Ullery's title to the lot described quieted, upon the alleged ground that it was, under the circumstances, equitably exempt from execution on all the judgments set forth in the complaint.

The circuit court might, with propriety, have required the complaint to be made more certain and specific in some respects; but we regard it as fairly inferable from the averments of that pleading that, for the three months immediately preceding the conveyance of the lot to Ullery, Brown was the owner only of the lot and of $223 worth of personal property, and that both did not exceed in value the net sum of $600, and that this condition of things existed at the time of the conveyance.

Conceding this condition of things to have existed at that time, and for near three months previously, as we construe the complaint to have substantially averred, the recording of the judgments in the clerk's office did not create any lien upon the lot.

Property exempt from execution is unaffected by execution liens, and may be sold or exchanged even while writs of execution are in the hands of the proper officer. Freeman Executions, section 197; *Godman* v. *Smith*, 17 Ind. 152; *Taylor* v. *Duesterberg*, 109 Ind. 165.

The material inquiry, therefore, as to the value of Brown's property had relation to the time of the conveyance, and not to the time of the commencement of this suit.

For these reasons the averments as to the issuance of executions on some of the judgments, and as to the filing of certain schedules of his property by Brown, were immaterial to the essential matter of inquiry concerning the value of Brown's property.

No demand was necessary to the maintenance of this action. The appellants had filed transcripts in the clerk's office, and had thus placed themselves in a position to proceed against Brown's real estate whenever they might choose to do so.

This constituted an element of disturbance to Brown, and a cloud upon Ullery's title, sufficient to justify a resort to legal proceedings for the relief prayed for.

The circuit court did not, as we believe, err in overruling the several demurrers to the complaint.

The judgment is affirmed, with costs.

Filed Oct. 12, 1887.

No. 12,180.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. PHILLIPS.

RAILROAD.—*Negligence.—Right of Public to Use of Track Laid in Street.—Trespass.*—Where a railroad track is laid in a public street, the rights of the public and the railroad company respecting the use thereof are mutual, though those of the latter are paramount. A person is not a trespasser who walks along such track, and if in so doing his foot becomes fastened in an opening which exists by reason of the negligent construction of the track, and he is run upon by a train of the railroad company, which is negligently managed, he being without fault, the railroad company is liable for the injuries sustained.

VARIANCE.—*Pleading.—Evidence.*—A verdict will not be disturbed on account of an immaterial variance between the pleading and proof.

From the Lawrence Circuit Court.

G. W. Friedley and *W. H. Martin*, for appellant.

J. R. East, *W. H. East* and *G. W. Cooper*, for appellee.

ELLIOTT, J.—The appellee alleges in the first paragraph of his complaint that the track of the appellant is laid upon Railroad street, in the city of Bloomington, for the distance of the one-half of a mile; that it crosses several streets,

112	59
113	197
116	453
120	473
122	540
112	59
126	467
112	59
130	5
112	59
134	400
112	59
140	278
143	465
112	59
151	592
112	59
157	689
112	59
161	510
112	59
168	346

among others Fourth and Fifth streets; that in constructing the track a space of three or four inches was left between the guard-rail and the rails of the track; that, on the 27th day of December, 1882, the appellee, without any fault or negligence on his part, was crossing the track and caught his foot in the space between the guard-rail and the rails of the track; that the appellant negligently and carelessly ran one of its trains upon the appellee while his foot was fastened between the rails, and greatly injured him.

The second paragraph of the complaint contains substantially the same allegations as to the appellant's negligence in running a train upon the appellee while his foot was fastened between the rails, as to his own care, and as to the occupancy of Railroad street by the appellant's track, but it also alleges that for the use of persons travelling upon the street the appellant had constructed and maintained a walk or platform, and that it was guilty of negligence in constructing and maintaining the walk, thereby endangering the life and limbs of those who travelled over it.

There was no demurrer addressed to the complaint, nor is there any attack upon it that we can properly notice, although counsel have assigned as error rulings upon demurrers to each paragraph of the complaint. We do not, therefore, pass upon the sufficiency of the complaint, but confine our decision to such questions as are properly presented.

The material facts which are established by the evidence are these: In 1853 the track of the appellant was constructed upon and along Railroad street, in the city of Bloomington, and has since been maintained and used. Between the tracks of the company, and on each side, the ground is covered by planks. On the 27th day of December, 1882, the appellee, a lad about eight years of age, was sent on an errand, and passed down Fifth street until he reached Railroad street, and there entered upon the track laid in that street; from this point he walked toward Fourth street, and when opposite the appellant's depot, and within twenty feet of Fourth street,

his foot was caught between the rail of the track and the plank on the inside of the track. His foot was so firmly fastened that he could not extricate it, and while he was thus fastened a train of cars was run upon him and he was very severely maimed and injured. The employees of the appellant were guilty of negligence in the management of the train, but there was no intentional or wilful wrong on their part. The track was negligently constructed and maintained, and was in such a condition, through the fault of the company, as to endanger the lives and limbs of those walking along the track laid in the street.

It is important to keep in mind the fact that the injury to the appellee did not occur at a street crossing, but at a point on the track laid along a street twenty feet north of the crossing. If the injury had been caused solely by the negligence of the appellant in constructing or maintaining the crossing, there would be no doubt as to the appellee's right of recovery, for it is the duty of a railroad company to maintain street or highway crossings, changed by it for its own purpose and convenience, in a reasonably safe condition for passage. *Delzell* v. *Indianapolis, etc., R. R. Co.*, 32 Ind. 45; *Indianapolis, etc., R. R. Co.* v. *Stout*, 53 Ind. 143; *Louisville, etc., R. W. Co.* v. *Smith*, 91 Ind. 119; *South, etc., R. R. Co.* v. *McLendon*, 63 Ala. 266; *Kelly* v. *Southern, etc., R. R. Co.*, 28 Minn. 98; *Oliver* v. *Northeastern R. W. Co.*, 9 Eng. Rep. (Moak) 350; 2 Wood Railway Law, 1382.

But the appellee was not injured at a crossing, so that the rule we have stated can not directly apply, although the principle which it asserts may exert an important influence in the decision of the case; for, if the place where the injury was inflicted was still a street, the principle the rule embodies does exert a potent influence. 2 Wood Railway Law, 958.

If the place where the accident occurred was exclusively the track of the railroad company, in which the public had no rights, then there can be no recovery on the sole ground that the employees of the appellant were negligent in the

management of the train which ran upon the appellee, for it does not appear either by positive evidence or by inference that they knew that the lad was fastened to the track. Had they known of his unfortunate situation it would have been their duty, even had he been on a track in which the company's right was exclusive, to have used reasonable effort to bring the train to a stop. If the employees see a man bound to the rails in time to check the train, they must use reasonable measures to check it, and not suffer it to run upon the helpless man; but, if they do not see him in time to check the train, the company can not be held liable; nor could it, even in such a case, be held liable unless the employees knew of the helpless condition of the person on the track. *Indianapolis, etc., R. W. Co.* v. *Pitzer*, 109 Ind. 179; *Lafayette, etc., R. R. Co.* v. *Huffman*, 28 Ind. 287; *Lake Shore, etc., R. R. Co.* v. *Miller*, 25 Mich. 274.

On the hypothesis that the place where the appellee received his injury was exclusively the roadway of the company, something must be superadded to the negligence of those in charge of the train in order to justify a recovery. On that hypothesis much more must be shown.

If the place where the lad caught his foot between the rail and the plank was the roadway of the company to the exclusion of the rights of the public, then there can be no recovery, even though the way was so unsafe that no citizen could walk along it without injury coming upon him. If the way was the exclusive roadway of the company, in which the public had no right of passage, then the company would not be liable to one who walked along it, unless the injury inflicted upon him was the result of wilful or intentional misconduct. But if it was a street which the public had a right to use, then, although it may have been occupied by the track of the company, the person who walks upon it is not a trespasser. It is true that circumstances may make him guilty of contributory negligence that will defeat a recovery, but the mere fact that he walks upon the highway does not

make him a trespasser, although the railroad company has its track laid in the highway. A trespasser has no right to exact care from a railroad company; but one who is not a trespasser has a right to exact a reasonable degree of care, if he is not himself in fault.

It is not necessarily inferable, because both the railroad company and the public have rights in a street or highway, that one who enters on the track in the street is a trespasser; nor, indeed, can it be inferred from that fact alone that he is guilty of negligence. If the way retained its character as a public one, it was not a wrong on the part of the citizen to carefully pass over it, even though it be conceded that, so far as respects the running of trains, the right of the company is paramount. Although this right of the company is paramount, still a right of action may exist in favor of one who is injured by the negligence of the company's servants. It may be true, and probably is true, that the railroad company has the superior right. *Cincinnati, etc., R. R. Co.* v. *Butler*, 103 Ind. 31. It can not, however, be inferred from this that the citizen has no right to use the track for passage; he does have that right, but it is, perhaps, subordinate to the right of the company.

The cases relied upon by appellant's counsel certainly do not sustain the doctrine that the paramount right of the company absolves it from duty to those who walk along the way upon which its tracks are laid.

The first case cited is *Barker* v. *Hudson River R. R. Co.*, 4 Daly, 274. All that is decided in that case is that a cartman is bound to get off the track when he sees a train approaching, and that the ordinary rules of the road do not apply. But it is tacitly conceded, if, indeed, not directly affirmed, that, where a track is laid in a street, the public may still use it, subject only to the right of the railroad company to move its trains over the track.

The second of the cases cited, and the one chiefly relied on, is that of *Zimmerman* v. *Hannibal, etc., R. R. Co.*, 71 Mo.

476. In that case it was conceded that as to crossings the rights of the citizen are paramount, but that where the track is laid along a street it is otherwise. We agree to the doctrine that the rights of the railroad are paramount so far as the running of trains is concerned, but we think that it is so also as to crossings, for citizens must concede the superior right of passage to the trains of the company, wherever the trains are rightfully run. But the court did not hold the injured person to be a wrong-doer because he undertook to walk on the track, but he was held guilty of contributory negligence in carelessly going on the track in front of an approaching train. It is obvious that the case we are commenting on does not decide that the paramount right of the railroad company excludes all persons from travelling along the street occupied by the track; for what it decides is, that one who does travel along it must not be guilty of contributory negligence, thus fully conceding that one who does exercise care may rightfully travel along it.

The case of *Lake Shore, etc., R. R. Co.* v. *Hart,* 87 Ill. 529, is not in point for several reasons, but it is enough to say that the injured man was at the time of his injury, as the court declares, "walking laterally upon the track where it was exclusively the private right of way of the railroad company."

The case of *Wilbrand* v. *Eighth Avenue R. R. Co.*, 3 Bosw. 314, is against the appellant, for it was there said: "The public have a right, undoubtedly, to drive upon and across the track, but not so as to interfere with the proper business of the company."

The case of *Jersey, etc., R. R. Co.* v. *Jersey City, etc., R. R. Co.*, 20 N. J. Eq. 61, can not be regarded as in point upon this branch of the case.

The decision in *Adolph* v. *Central Park, etc., R. R. Co.*, 65 N. Y. 554, is very strongly against the appellant, for it was there held that "One travelling upon a city street has a right to drive his wagon upon or across the track of a street railroad,

and this right is not confined to occasions where the other portions of the street are crowded or obstructed. The only limitation of the right is that he must not unnecessarily interfere with the passage of the cars; these have the preference in the use of the track." *Chicago, etc., R. W. Co.* v. *Bert*, 69 Ill. 388, was a street railroad case, and simply decides that wagons must give way to the cars.

We have now examined all of the cases cited by counsel on this particular question, and we have found those that are in point are decisively hostile to the counsel who place them before us. It is, indeed, quite plain that the position taken can not be maintained, for the bare assertion that the right is paramount necessarily implies that there are other rights, although inferior ones, and if this be true, it must also be true that one who carefully exercises the inferior right is not a wrong-doer to whom the company owes no duty.

The case of *Smedis* v. *Brooklyn, etc., R. R. Co.*, 88 N. Y. 13, is directly in point. In that case the track was laid along a public street, and the plaintiff was injured on that street, but not at a crossing, and the company was held liable. The court, in the course of its opinion, said: "But, assuming that the deceased was not attempting to cross at the crossing on Liberty avenue, but was on Van Sinderin avenue when struck, it does not follow as a matter of law that this action can not be maintained. Sufficient evidence was given on the trial to warrant the jury in finding that this avenue was a public street. The defendant did not show, or offer to show, that it had any right upon this street except to lay down a railroad track therein and run cars thereon. The intestate, therefore, had a lawful right to go upon the defendant's track, * * and if while there he was killed by the negligent act of the defendant, and without any want of care on his part, this action can be maintained."

In *Frick* v. *St. Louis, etc., R. R. Co.*, 75 Mo. 595, the plaintiff was struck "midway between Grand avenue and

Theresa street," in the city of St. Louis, and the court, pushing the general doctrine much further than we are required to do here, held the defendant liable. There are other cases in the same court which go still further—much further, indeed, than we should be inclined to do. *Harlan* v. *St. Louis, etc., R. W. Co.*, 65 Mo. 22; *Stillson* v. *Hannibal, etc., R. R. Co.*, 67 Mo. 671; *Bell* v. *Hannibal, etc., R. R. Co.*, 72 Mo. 50.

In one of our works on railroads it is said: "But although railroad trains and travellers * * have equal rights to public crossings and streets, yet, as an ordinary vehicle is more easily controlled than a train of cars and locomotive, it behooves those travelling in ordinary vehicles to check up and wait for approaching trains to pass." 2 Rorer Railroads, 1049.

It may be that the author is in error in saying that the rights are equal, but, as the authorities show, he is correct in saying that both have rights in a public street. Another author says: "Where a highway is used as a part of a railway line, travellers on the highway have a right to cross the railway line at any point, and not merely at the intersection of other highways, and the railway is liable to one injured while crossing at a point other than the intersection of another highway, if the railway was in any respect negligent in the operation of its line; and under such circumstances the railway is bound to observe, at every point of its line on the highway, the same precautions which it is bound to observe at an ordinary highway crossing." Railway Accident Law, 157.

Many of the cases go much further than the cases we have cited, for they hold that if the place has been used as a highway for a long period of time, and this use is with the knowledge and permission of the railroad company, it is its duty to treat it as a highway and to take precautions to prevent injury to those who travel over it. *Barry* v. *New York, etc., R. R. Co.*, 92 N. Y. 289; *Byrne* v. *New York, etc., R. R. Co.*, 104 N. Y. 362; *Harriman* v. *Pittsburgh, etc., R.*

R. Co., 9 Western Rep. 438; *Chicago, etc., R. R. Co.* v. *Hedges*, 105 Ind. 398; *Bellefontaine, etc., R. R. Co.* v. *Snyder*, 18 Ohio St. 399; *Graves* v. *Thomas*, 95 Ind. 361 (48 Am. Rep. 727). The doctrine of these cases is in harmony with the rule that has long prevailed and has been again and again enforced, and that is, that where the railroad company licenses the public to make a general use of its track it can not treat a citizen who walks upon it as a trespasser. Of the great number of cases asserting this principle we cite only a few: *Davis* v. *Chicago, etc., R. W. Co.*, 58 Wis. 646; *Murphy* v. *Chicago, etc., R. R. Co.*, 38 Iowa, 539; *Bennett* v. *Railroad Co.*, 102 U. S. 577; *Kay* v. *Pennsylvania R. R. Co.*, 65 Pa. St. 269; *Campbell* v. *Boyd*, 88 N. C. 129 (43 Am. Rep. 740).

We conclude our discussion of this branch of the case by a quotation from the opinion of the court in *Kansas Pacific R. W. Co.* v. *Pointer*, 9 Kan. 620: "If," said the court, referring to the plaintiff, "he should show that the place where the injury occurred was on a public street, either in law or fact, he would not be such a trespasser as would relieve the railway company from exercising reasonable and ordinary care and diligence towards him. In fact, he would not be a trespasser at all. The railway company in such a case would be bound to run its trains with reference to him, and to every other person who might be rightfully occupying the street. Such persons would have the same right to be on the street as the railway company. In fact, in this case the legal right of the railway company, and that of the public, to use this ground as a street, seem to be about equal. * * The public used this ground for a street, however, long before the railroad was built. If the plaintiff and the railway company each had a right to use said ground, then it was incumbent on each alike to use ordinary care and diligence to prevent and avoid injuries."

The appellee, although not a trespasser in walking along the track laid in the highway, was, nevertheless, bound to ex-

ercise care to protect himself from injury. He had a right to walk on the track as part of the highway, but it was his duty to use a degree of care proportioned to the situation and circumstances, and this care extends to the condition of the track and to the running of the trains. We are not inclined to adopt the view that the rights of travellers and the railroad company are equal, although they are mutual; for we think that as to the right of way for the running of trains the rights of the company are paramount. It is, therefore, the duty of one who walks upon a track to use reasonable care to discover and avoid danger. He has no right to go upon the track, even though it is in a public highway, expecting that the company will check its trains to make way for him; on the contrary, he must exercise vigilance, and that vigilance must be correspondent to what he is bound to know is the paramount right of the railroad company. In this case we think the evidence sustains the finding of the jury that the company was negligent and the appellee was not. It must not be forgotten that the appellee was fastened to the track and could not leave it to avoid the coming train; he was powerless to avert the danger even had he seen it in time to have left the track. Nor must it be forgotten that it was through the negligence of the company that the track which traversed the street was made unsafe. It may be, even where the company changes the face of a highway for its own convenience, that it is not bound to make it safer for travellers upon it than its use for a railroad will permit. It may be, too, that one who walks upon it is bound to know that it is a railroad track, and is not safer for use for passage than the object to which it is devoted will allow. But, granting all this, there may still be a recovery, for the evidence satisfactorily shows that the appellee was using such care as even a prudent and careful person of adult age would have used in making his way along the track, that the unsafe condition of the track was due to the negligence of the company, and that it was also negli-

gent in managing its train. The case is an unusually strong one, for there was double negligence on the part of the company.

There is, perhaps, a variance between the allegations of the complaint, as to the precise character of the defect in the track, and the evidence, but the variance is not a material one. Under our statute a verdict can not be set aside for such a variance. R. S. 1881, sections 391, 392, 393.

This is not a case where the plaintiff declares on one theory and gives evidence upon another, so that the cases of *Chicago, etc., R. R. Co.* v. *Bills*, 104 Ind. 13, *Mescall* v. *Tully*, 91 Ind. 96, and cases of like character, do not apply.

We have not stopped to inquire as to the effect of the appellee's tender age, for we think he is entitled to a recovery if bound by the same rules as an adult person.

We have disposed of all the questions that the record properly presents, and do not deem it necessary to notice in detail the phases in which they are presented.

Judgment affirmed.

Filed Oct. 12, 1887.

No. 13,604.

Hunt v. The Lake Shore and Michigan Southern Railway Company.

Railroad. — *Private Farm Crossings. — Railroad Company not Liable for Injuries to Animals Going Upon Track at Such Points. — Statute.* — Under the acts of April 8th and 13th, 1885, a railroad company is not liable, in the absence of negligence, for the injury or killing of animals going upon its track through gates at private farm crossings, whether such crossings were constructed prior to those acts, or under the power given

by the first section of the act of April 8th, or since the passage of those acts.

STATUTE.—*Constitutional Law.—Fifth Section of Act of April 13th, 1885, Constitutional.*—The 5th section of the act of April 13th, 1885, which provides for the fencing of rights of way by railroad companies, the construction of cattle-guards, etc., is valid and constitutional, being sufficiently connected with the subject as expressed in the title.

SAME.—*Construction of.*—In the construction of statutes the intention of the Legislature must govern, and, in ascertaining that, the courts will look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief intended to be remedied, and all like matters, and will, as far as practicable, make such application of the provisions of the statute as will best promote the object of its enactment.

From the LaPorte Circuit Court.

J. H. Bradley, for appellant.

J. H. Baker, for appellee.

ZOLLARS, C. J.—The material facts in the case, as stated in the pleadings, and found specially by the court below, are these: More than twenty years before the cause of action, as relied upon by appellant, accrued, the appellee railway company, by appropriate condemnation and appropriation proceedings, under the statute then in force, acquired a right of way through the lands then and now owned by B. C. Bowell, and constructed its railway thereon. On the lands of Bowell there is a farm crossing and two gates, which were constructed by the railway company about twenty years ago for his use and convenience, and which have been kept in repair by the railway company since their construction, without any contract or agreement on its part so to do.

Appellant is, and for some years has been, the owner of land adjoining that owned by Bowell. These tracts of land were separated by a partition fence sufficient to turn live stock. On the night of the 23d of March, 1886, appellant's horses were upon his pasture land. On that night a portion of the partition fence was thrown down by a storm, and three of the horses went through one of the openings on to the land

of Bowell, and from there through one of the farm gates, which had been left open by some unknown person, on to the railway, and were there killed by a train of appellee's cars. The railway through the land of Bowell was securely fenced at the place where, and at the time, the horses entered upon it, except in so far as the leaving of the gates open at the time and in the manner above stated rendered it insecurely fenced.

Upon the foregoing facts the court below concluded as a matter of law that appellee is not liable, and rendered judgment accordingly. From that judgment appellant prosecutes this appeal, and claims that the court below erred in its conclusions of law, and in its rulings upon the pleadings, which presented the same question.

The liability of the railway company, under the facts pleaded and found by the court, is dependent upon the construction, scope and effect to be given to the acts of April 8th and 13th, 1885. Acts 1885, pp. 148, 224.

Acts were passed by the Legislature in 1852, 1853 and 1863, making railway companies liable for animals killed upon their tracks. 1 R. S. 1852, p. 426; 1 G. & H., p. 522; 1 R. S. 1876, p. 751.

The first section of the act of 1863 was amended in 1877, but in no regard material here. Acts 1877, Special Session, p. 61.

The act as so amended was carried forward into the revision of 1881. R. S. 1881, section 4025, *et seq.* In each of the acts there was a section providing that the act should not apply to any railway "securely fenced in" and the fences properly maintained by the company. Such was the statute prior to the acts of 1885.

The necessity resting upon railway companies to construct and maintain fences in order to escape the liability imposed by the statutes prior to those of 1885, the sort of fences required in order to escape such liability, the localities where fences might be dispensed with without incurring such liability, and the liability of such companies where animals

entered upon the track through gates at farm crossings and were killed or injured, have been settled by numerous judicial interpretations of those several statutes.

Construing those statutes, it was held that where a person, through whose land a railway was constructed, agreed to build and maintain fences along the right of way, the road would, as to him, be regarded as fenced, and that if he failed to build and maintain such fences, and his animals passed to the track and were killed, he could not recover from the railway company on the ground that it had not fenced its track as required by the statute. *Terre Haute, etc., R. R. Co.* v. *Smith*, 16 Ind. 102; *Fort Wayne, etc., R. R. Co.* v. *Mussetter*, 48 Ind. 286; *Bond* v. *Evansville, etc., R. R. Co.*, 100 Ind. 301, and cases there cited. And so it was held, that where a railway company had securely fenced its track, and permitted an adjoining land-owner to erect in such fence draw-bars and gates for his own convenience in crossing the road, and by reason of the neglect of such land-owner to maintain such bars or gates, his stock passed to and upon the track and was killed or injured, the company was not liable for the damages sustained, nor was it liable to the tenant of such land-owner, whose stock passed through such gate to the track and was there injured or killed. *Indianapolis, etc., R. R. Co.* v. *Shiner*, 17 Ind. 295; *Bond* v. *Evansville, etc., R. R. Co.*, *supra*, and cases there cited; *Louisville, etc., R. W. Co.* v. *Goodbar*, 102 Ind. 596.

It was further held that an adjoining land-owner, for whose benefit a private crossing was constructed and maintained by the railway company, could not recover against the company under the statute, where his stock passed to the track through the gates of such crossing which he had neglected to keep closed. *Evansville, etc., R. R. Co.* v. *Mosier*, 101 Ind. 597; *Wabash R. W. Co.* v. *Williamson*, 104 Ind. 154.

It was for a time held, that, under such circumstances, the railway company was not so liable to such land-owner, nor to any other person whose stock entered upon the track through

such gates. *Indianapolis, etc., R. R. Co.* v. *Adkins*, 23 Ind. 340; *Indianapolis, etc., R. R. Co.* v. *Adkins*, 23 Ind. 345; *Indianapolis, etc., R. R. Co.* v. *Petty*, 25 Ind. 413; *Bellefontaine R. W. Co.* v. *Suman*, 29 Ind. 40.

So far as those cases exempted railway companies, under such circumstances, from liability to others than those for whose convenience such crossings and gates were constructed and maintained, they were doubted, and virtually overruled by the case of *Cincinnati, etc., R. R. Co.* v. *Ridge*, 54 Ind. 39. Since the decision of that case until the present time, it has been held that, while railway companies were not liable, under the statutes prior to those of 1885, for the injury or killing of animals of adjoining land-owners for whose convenience private crossings and gates were constructed, where the animals passed to the track through such gates, which such land-owner failed to keep closed, they were liable to other persons whose animals might pass through such open gates to the track and be there injured or killed. *Indianapolis, etc., R. W. Co.* v. *Thomas*, 84 Ind. 194; *Bond* v. *Evansville, etc., R. R. Co., supra; Evansville, etc., R. R. Co.* v. *Mosier, supra; Louisville, etc., R. W. Co.* v. *Goodbar, supra; Wabash R. W. Co.* v. *Williamson, supra.*

Such was the law at the time the acts of 1885 were passed. Under the law as thus settled, there could be no question as to the liability of appellee under the facts pleaded and found in the case before us.

It is contended by counsel for appellant that railway companies are liable in cases like this, just as they were formerly, notwithstanding the acts of 1885. On the other hand, it is contended by counsel for appellee that under those acts there is no liability on the part of railway companies in such cases. The first section of the act of April 8th, 1885, provides, that owners of land separated by the right of way of a railway company may, if such right of way has been acquired by condemnation or appropriation, enter upon the same and construct and maintain wagon and drive-ways over

and across such right of way, leading from one of such tracts to another on opposite sides of such railway, etc.

Section two provides, that where such railroad is fenced on one or both sides at the point where such way is constructed, such owner shall erect and maintain substantial gates in the line of such fence or fences across such way, and keep the same securely locked when not in use by himself or employees.

Section three provides, that if animals are killed or injured on the track of such railroad by the cars or locomotives thereof, the company owning or operating such railroad shall not be liable to pay damages therefor, if such animals entered upon the track of such railroad through such gates, unless it shall be proved that such killing or injury was caused by the negligence of the servants of the company owning or operating such railroad.

Of sections one, two, three and four of the act of April 13th, 1885, it is sufficient, in this connection, to say that, amongst other things, they provide generally for the fencing of railways, and the maintenance of such fences by railway companies, and, in certain cases, for such fencing and maintenance by adjoining land-owners at the expense of such railway companies, and for the saving of actions under former laws.

Section five, the last section of the act, is as follows: "All gates and bars at farm crossings, shall, in the absence of a contract or agreement to the contrary, be constructed and maintained and kept closed by the owner of such farm crossing."

In support of the contention for the liability of appellee in this case, appellant's counsel argues:

First. That sections two and three of the act of April 8th, 1885, relate wholly to gates at crossings constructed by adjoining land-owners under the power given by the first section of the act, and have no relation whatever to gates at crossings constructed before the act took effect, or voluntarily

constructed by the railway company for the convenience and use of such land-owners.

Second. That section five of the act of April 13th, 1885, has reference also to gates and crossings constructed by land-owners under the power given by the first section of the act of April 8th, 1885.

Third. That the first section of that act is unconstitutional.

Fourth. That said sections two, three and five are so connected with, and dependent upon, that section that they must fall with it.

Fifth. That section five of the act of April 13th is invalid, because not within the title of the act.

While the first two arguments, based upon a technical construction of certain words of the statute, are not without plausibility, they have not convinced us that the construction of the statute contended for is the correct one. On the contrary, our examination has led us to the conclusion that counsel's contention can not be maintained.

It is a settled principle, that in the construction of statutes the intention of the Legislature must govern. To ascertain that, the judiciary may look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief intended to be remedied, and all like matters, and should endeavor, as far as practicable, to make such an application of the provisions of the statute as will best promote the object of its enactment. A construction which would lead to an absurdity, or possible injustice or contradiction, or unreasonable results, is always to be avoided if possible. *Middleton* v. *Greeson*, 106 Ind. 18, and cases there cited.

It is conceded in argument, that prior to the statutes of 1885 the land-owner could not obtain a private crossing over a railway, except with the consent of the railway company. Where such crossings were allowed they were by the grace of the company. And while it was held that, as between the railway company and the land-owner for whose benefit the

crossing and gates were allowed, the road would be regarded as securely fenced, it was also held, as we have seen, that as to other persons the company was bound at its peril to see that the gates were kept closed, and was liable to such persons for the injury or killing of their animals which passed to the track through such gates.

Liability could not be certainly avoided except by refusing crossings to all farmers. To allow such crossings for the convenience of adjoining land-owners, whose land was separated by the railroad, was regarded by the companies as so reasonable as not to be denied.

There was constant contention on the part of railway companies that, having granted such a reasonable privilege to such land-owners, they should not be held liable to any one for the injury or killing of animals getting upon the track through the gates at such crossings, left open through the neglect of such land-owners. The argument was that they should not be convicted and punished as for a wrong, when the privilege granted was so eminently reasonable. And so this court, as we have seen, for some time held.

The statutes of 1885 enacted into a right, on the part of the land-owner whose land is separated by rights of way of railway companies, in certain cases, what was before but a privilege voluntarily granted by such companies. Those statutes, also, impose upon such land-owners the duty of keeping the gates at such crossings closed, and thereby relieve the railway companies from all liability for the injury or killing of animals that may pass to the track through such gates.

Under the first section of the act of April 8th the right of the land-owner to force a crossing over the track is, by the terms of the section, limited to cases where the right of way was, or may be, acquired by condemnation or appropriation proceedings.

Was it the intention of the Legislature, in the enactment of the statutes of 1885, that, where crossings may be forced

over the track, railway companies shall be relieved from all liability on account of the gates being left open by the land-owner for whose benefit such crossing is constructed, and that they shall still be held liable, as formerly, in all cases where such crossings had been, or may be, constructed by license of, or voluntarily by, railway companies for the use and convenience of such land-owners?

To answer this question in the affirmative would be to so construe the statutes as to lead to an unreasonable result. The result of such a construction as stated, in substance, by counsel for appellee, would be this:

1st. Where crossings and gates have been, or may be, constructed under the power given by the first section of the act of April 8th, 1885, on a part of the right of way acquired by condemnation proceedings, the railway company is under no obligation, or duty, to keep the gates closed, and will not be liable to any one for the injury or killing of animals going upon the track at such gates, unless negligence is averred and proven.

2d. If the crossing and gates have been constructed since the act of April 8th, 1885, took effect, and on a part of the right of way acquired otherwise than by condemnation proceedings, the railway company is bound as to all persons, except the land-owner for whose convenience the crossing and gates have been constructed, and his tenants, to keep the gates closed, and will be liable, without proof of negligence, for the injury or killing of animals going upon the track through such gates.

3d. If the crossing and gates were constructed before the act of April 8th, 1885, took effect, as to all persons except the land-owner for whose benefit the crossing was constructed, and his tenants, the railway company is bound at its peril to keep the gates closed, and will be liable for the injury or killing of animals going upon the track through such gates, however the right of way may have been acquired.

Evidently, it was not the purpose of the Legislature, in

the enactment of the statutes, to fix such varying measures of liability on the part of railway companies in connection with farm crossings.

Whatever room there might be for argument upon the act of April 8th, standing alone, section five of the act of April 13th is broad and comprehensive in its terms, and covers all cases of farm crossings. To say that that section imposes upon the land-owner the duty of keeping such gates closed only as between himself and the railway company, and that it does not relieve the company from the duty of keeping them closed as to third parties, is to convict the Legislature of the folly of enacting what was the law already. The result of the legislation is, and doubtless the purpose of the Legislature in the enactment of the statutes was, to limit the liability of railway companies, as connected with farm crossings, as it was limited by the case of *Indianapolis, etc., R. R. Co.* v. *Adkins, supra*, and the cases following it.

This construction of the statutes establishes what we think was the purpose of the Legislature, a uniform rule of liability on the part of railway companies, as connected with farm crossings.

A contrary ruling could be of no practical and lasting advantage to those for whose convenience any of such crossings may have been constructed, nor to others. If, as conceded, the crossings and gates constructed prior to the acts of 1885, or across rights of way acquired by means other than condemnation, were, in the absence of contract, constructed and have been maintained, under a mere license from the railway company, or were constructed and have been maintained by the company as a matter of favor merely, doubtless, in most cases, the license may be revoked, the favor discontinued, and the crossing permanently closed by the company. Should that be done, the farmer would have no remedy but in the exercise of the power given by the first section of the act of April 8th, 1885; and the exercise of that power would bring the case clearly within the provisions of the acts

of 1885, as construed by counsel for appellant, and the railway company would not be liable to any one for the injury or killing of animals going upon the track through the gates thus constructed. And thus railway companies would have it in their power to ultimately bring almost every case within the terms of the acts of 1885, as interpreted by appellant's counsel.

If it be said that there may be some crossings which have existed for such a length of time, and under such circumstances, that the license on the part of the railway companies has ripened into an irrevocable right, so that they may be, and are, maintained against the wishes of the company, then such cases would be clearly within the spirit of the acts of 1885, as also interpreted by appellant's counsel.

If, as in effect contended, the exemption from liability on the part of railway companies under the acts of 1885, as connected with farm crossings, exists only where the company has no power to prevent such crossings, the above possible cases would clearly fall within the reason and spirit of the exemption.

It is argued, as before stated, that section five of the act of April 13th is invalid, because not embraced in the title of the act.

The title of the act is as follows: "An act requiring railroad corporations, and other persons operating and controlling railroads, to fence their right of way and railroad track, and to construct barriers and cattle-guards at certain public road and highway crossings, and to maintain and keep the same in repair, and prescribing remedies and penalties for failing to do so."

Without extending this opinion in the way of argument, we are satisfied that the fifth section of the act is so much a part of, and so connected with, the subject expressed in the title, as not to be open to the objection urged by counsel. See *Madison, etc., R. R. Co.* v. *Whiteneck*, 8 Ind. 217.

Our conclusion upon the whole case is, that under the acts

of 1885, neither in this, nor in similar cases, is the railway company liable, in the absence of negligence, for the injury or killing of animals going upon the track through gates at farm crossings, whether those crossings were constructed prior to those acts, or under the power given by the first section of the act of April 8th, 1885, or since the passage of those acts. This conclusion renders it unnecessary for us to decide here whether or not the first section of the act of April 8th, 1885, is constitutional. It may, however, be observed in passing, in the first place, that section five of the act of April 13th, 1885, which, of itself, is broad enough to exempt railway companies from liability in such cases, without reference to sections two and three of the act of April 8th, is not so connected with the first section of that act as to fall with it, if it should be held to be unconstitutional. And, in the second place, as it now seems to us, the question of the power of the land-owner to force a crossing over the track of a railway company is a question which concerns such land-owner and the railway company only. If a land-owner should exercise the power given by that section, and construct crossings and gates as therein provided, without question by the railway company as to the constitutionality of the section, we do not see, as at present advised, how the owners of animals injured or killed at such crossings could make the question. But as we have concluded that, in the absence of negligence, railway companies are not liable, under the other provisions of the acts of 1885, for the injury or killing of animals at farm crossings, even though the crossings may have been constructed with their consent, or by them, and independent of the power given by the first section of the act of April 8th, the question of the constitutionality of that section becomes immaterial, and hence we do not decide it.

As the rulings of the court below are in accord with this opinion, the judgment is affirmed, with costs.

Filed Oct. 11, 1887.

113	81
114	405
117	49
119	81
127	473
112	81
159	609
113	81
161	415

No. 12,960.

ROBERTS *v* SPENCER, EXECUTOR.

DECEDENTS' ESTATES.—*Notice of Pendency of Final Settlement.—Requirements of.*—The notice of the time fixed for the hearing of an executor's or administrator's final settlement, required by sections 23 and 26 of the act of March 7th, 1883 (Acts 1883, p. 160), may be signed by the clerk of the court in which the matter is pending, and is not insufficient if it recites that it is "to the heirs, creditors and legatees," instead of "to all persons interested in said estate."

SAME.—*Claims.—When Barred.—Statute Construed.—Exceptions to Final Settlement Report.—Practice.*—Under the provisions of section 5 of the act of March 7th, 1883 (Acts 1883, p. 151), a claim against a decedent's estate will be barred if not filed at least thirty days before the filing of the final settlement report by the executor or administrator, subject to the exceptions of that section, and exceptions to such final settlement, filed by a creditor, based on the ground that he has a valid claim against such estate, which has not been filed within the time provided by statute, no excuse for the delay being set forth, and no fraud on the part of the executor being alleged, should, on motion, be stricken out.

From the Henry Circuit Court.

C. L. Henry and *H. C. Ryan*, for appellant.

J. Brown and *W. A. Brown*, for appellee.

MITCHELL, J.—It appears from the record in this case that Anderson Spencer, executor of the last will and testament of James N. Thornton, deceased, filed his final settlement report, as such executor, in the office of the Henry Circuit Court, on the 6th day of January, 1886. It appeared from the account stated, and the executor's report, that the estate had been pending in court for more than one year, the last current report having been made April 16th, 1885, and that all claims against the estate had been fully paid, and all debts collected, and that the estate had been finally settled.

The clerk fixed the hearing on the first Monday of the

ensuing February term of the Henry Circuit Court, that being the 1st day of February, 1886. Notice of the date of the hearing so fixed was given by publication in a weekly newspaper of general circulation published in Henry county, and by posting notices at the court-house door for two successive weeks.

On the day fixed for the hearing, James L. Roberts, claiming to be a creditor of the estate, entered a special appearance and moved to set aside the notice, alleging as cause therefor, that the notices were not signed by the executor, but by the clerk of the Henry Circuit Court, and that the notices did not require the heirs of the decedent and all others interested to appear, but, instead thereof, notified "the heirs, creditors and legatees" to appear.

The first point relied on for a reversal is the ruling of the court in overruling this motion. The statute, sections 23 and 26, Acts 1883, p. 160–1, relating to the settlement of decedents' estates, requires notice to be given by executors and administrators, to all persons interested in the estate, of the time fixed for the hearing of any matters relating to a final settlement report theretofore filed. The statute does not require the notice to be signed by the executor or administrator, nor does it particularly specify by whom it shall be signed, or that it shall be signed at all. *Wright* v. *Wells*, 29 Ind. 354.

If the executor or administrator causes due notice to be published and posted, since the notice required is one which pertains to a judicial proceeding, there is neither impropriety nor a departure from the statute if the notices are signed by the clerk of the court in which the proceeding is pending.

That the notice ran, "to the heirs, creditors and legatees," instead of "to all persons interested in said estate," afforded no ground for setting it aside. As applied to the subject-matter, the one is substantially the equivalent of the other.

The appellant filed eight exceptions to the final settlement

report, which exceptions were, upon motion, stricken out by the court. Of these it is only necessary to notice the sixth and eighth, in which the appellant alleged as ground for excepting to the final settlement, that, on the 26th day of January, 1886, some twenty days after the final settlement had been filed, he had filed a meritorious claim of fourteen hundred dollars against the estate, which claim was then pending and unpaid.

The statute regulating the filing of claims against decedents' estates provides that "if such claim be filed after the expiration of one year from the giving of notice by the executor or administrator of his appointment, it shall be prosecuted solely at the cost of the claimant, and if not filed at least thirty days before final settlement of the estate, it shall be barred, except as hereinafter provided in case of liabilities of heirs, devisees, and legatees." Acts 1883, p. 153, sec. 5.

The policy of the statute relating to the settlement of decedents' estates is to require a succinct and definite statement of all claims against each estate, whether due or not, to be filed in the office of the clerk of the court in which the estate is pending for settlement, and to prohibit the payment of any claim except the necessary current expenses of administration, or sums directed to be paid by the will, unless the claim shall have been filed and admitted on the appearance docket, or unless it shall have been adjudged by the court. The legislative purpose to prevent unreasonable and unnecessary delay in the settlement of estates is also very clearly manifested in the statute. To this end executors and administrators are required to give notice of their appointment. They are likewise required, at the end of one year from their appointment, or so soon thereafter as may be, to file in the court issuing their letters a true and complete account, exhibiting the exact condition of the estate. If the report then filed is not a final settlement, it is the duty of the executor or administrator to make a final settlement within six months thereafter, unless otherwise ordered by the court for good

cause shown. After the expiration of one year from giving notice of his appointment, the court may, in its discretion and for cause shown, peremptorily order an executor or administrator to make final settlement, and may enforce compliance by attachment.

While claims filed against the estate remain pending, undisposed of, no final settlement can lawfully be made. *Reed* v. *Reed*, 44 Ind. 429; *Heaton* v. *Knowlton*, 65 Ind. 255.

The pendency of a single claim may involve the solvency or insolvency of the estate, and arrest any further payment by the administrator of claims against the estate; hence the provision of the statute requiring claims to be filed at least thirty days before final settlement. This means thirty days before the filing of any final settlement by the executor or administrator, after one year has expired from the time of giving notice of his appointment, and not thirty days before the confirmation of such report by the court.

An executor or administrator never could make a final settlement if, after making and filing such settlement, and pending its confirmation by the court, other claims might be filed.

An administrator who has collected all the assets, and paid them out on claims filed and allowed against the estate, is compelled by law to make a final settlement after the lapse of one year from giving notice of his appointment. If other claims may then come in he may be left to suffer for having performed his duty according to the letter and spirit of the statute.

No fraud or concealment on the part of the administrator is shown. *Reed* v. *Reed*, *supra*. The estate was administered in due course, so far as appears. If the appellant had a just claim against the estate, there is no valid reason shown for not having filed it within the time. The court did not err, therefore, in striking out his exceptions to the final settlement.

Judgment affirmed, with costs.

Filed Oct. 11, 1887.

119 85
120 51
123 457
119 85
127 473

No. 12,944.

Roberts v. Spencer, Executor.

Decedents' Estates.—*Statute Construed.*—The phrase "final settlement of the estate," as used in the last sentence of section 2310, R. S. 1881, and in section 5 of the act of March 7th, 1883 (Acts 1883, p. 154), means the filing of the account of the executor or administrator for final settlement, and claims not filed thirty days before such filing, at a time and in the manner authorized by law, will be barred.

Same.—*Claim.—Showing of Excuse for not Filing.*—For facts held to be insufficient to excuse a claimant for not filing his claim against an estate, so as to relieve him from the provisions of the statute under which such claim is barred, see opinion.

From the Henry Circuit Court.

C. L. Henry and *H. C. Ryan*, for appellant.

J. Brown and *W. A. Brown*, for appellee.

Niblack, J.—The proceedings appealed from in this case were based upon a claim filed by James L. Roberts against the estate of James W. Thornton, deceased, of which Anderson Spencer was the executor.

The complaint stated that prior to the 9th day of June, 1881, one Emma McGee, the divorced wife of the claimant, Roberts, was the owner in fee simple of a particularly described forty-acre tract of land in Madison county in this State; that he, Roberts, was desirous of purchasing said tract of land, but that he and the said Emma not being on friendly terms, she would not sell the same to him; that the said Roberts and Thornton, the decedent, who was the uncle of the former, and anxious to assist him in obtaining the land, entered into a parol agreement, whereby the said Thornton agreed that if he, the said Roberts, would furnish the money necessary for that purpose, the said Thornton would purchase the land, taking the title in his own name, and hold the land until such time as might be convenient to convey it to the

said Roberts; that the said Thornton thereupon purchased the land of the said Emma, and that he, Roberts, furnished the purchase-money used in payment for it; that, in pursuance of the terms of his purchase, the said Emma conveyed the land to him, the said Thornton, on the said 9th day of June, 1881; that the said Thornton afterwards, while still in life, contracted and sold said tract of land, in disregard of his said parol agreement, to one Phebe Poor for the sum of $1,200; that of said amount of purchase-money, agreed to be paid by the said Phebe Poor, the said Thornton received, in his lifetime, the sum of $800, and that since his death the remaining $400 was paid to his estate; that the widow and children of the said Thornton have, since the payment of the purchase-money, conveyed said tract of land to the said Phebe Poor; that the claimant, Roberts, had never received from the said Thornton, or from his estate, any part of the amount of purchase-money so paid by the said Phebe Poor.

Spencer answered that in the year 1882 letters of administration on the estate of the said Thornton, with the will annexed, were issued to him, of which notice was duly given, stating the particular manner in which such notice had been proclaimed; that he, the said Spencer, thereafter made annual reports of the condition of the estate in his hands as such administrator; that, on the 6th day of January, 1886, he made out and filed in the office of the clerk of the Henry Circuit Court his account for final settlement of the estate; that the clerk fixed the first day of the ensuing February term of the said court for the submission and hearing of said final account, of which notice was given as required by law; that the claim herein presented was filed on the 26th day of January, 1886, and not prior thereto; that prior to the making and filing of said account for final settlement he, the said Spencer, had collected all the assets belonging to the estate, and had paid the same all out on debts filed and proven against said estate, so that nothing then remained in his

hands for the payment of any other debt or claim. Wherefore it was alleged that the claim of the said Roberts was barred, and ought not to be allowed, and that said final settlement ought to be confirmed and the administrator discharged, notwithstanding the filing of such claim.

A demurrer to this paragraph of answer being first overruled, Roberts replied in three paragraphs, the first being in denial, and the second and third setting up special matter in avoidance. Demurrers were sustained to the second and third paragraphs of the reply, whereupon Roberts withdrew the first paragraph, and, standing upon his demurrer to the answer, declined to reply further. Final judgment against him for want of a reply then followed.

Section 2259, R. S. 1881, provides that every executor or administrator shall, within thirty days after his appointment, give notice that he has been so appointed, by publication three weeks successively in a newspaper having suitable relations to the proper county. Section 2310 further provides for the manner in which claims shall be filed against an estate, concluding with the declaration that "If such claim be filed after the expiration of one year from the giving of notice by the executor or administrator of his appointment, it shall be prosecuted solely at the costs of the claimant; and if not filed at least thirty days before the final settlement of the estate, it shall be barred, except as hereinafter provided, in the case of heirs, devisees, and legatees."

The 23d section of the act of March 7th, 1883, Acts of 1883, 160, which has reference to accounts which executors and administrators are required, from time to time, to file, still further provides: "Upon the filing of such account, the clerk shall fix a day, in term, by endorsement on the account, not less than three weeks from the date of filing, when the account will be heard; and if the account is for final settlement, * * * said executor or administrator shall give notice to all persons interested in said estate to appear in court on such day and show cause why such account

should not be approved, which notice shall be given by publication in some weekly newspaper of general circulation, published in the county in which the administration is pending, and by posting at the court-house door for two successive weeks." Section 24 of the same act directs that, on the day so fixed, the court shall proceed to hear said account, and, if it be found correct, to approve the same.

The question presented upon the sufficiency of the answer in this case is, whether upon the facts averred the claim of Roberts is barred under the concluding provision of section 2310 hereinabove set out.

The proper decision of that question depends upon the construction which ought to be given to the phrase "the final settlement of the estate," as used in that provision. The term "final settlement," as applied to the administration of an estate, is usually understood to have reference to the order of court approving the account which closes the business of the estate, and which finally discharges the executor or administrator from the duties of his trust, and ought generally to be so construed when there is nothing in the context justifying or requiring a different construction. *Parsons* v. *Milford*, 67 Ind. 489. But we regard the phrase in question, in the connection in which it is used, as implying more than the mere order of the court declaring the estate to be finally settled. When the court makes an order approving an account submitted for final settlement, it, in the absence of some other specific direction, relates back to the time the account was filed, and gives force and effect to the account from the date of its filing. Therefore, when an executor or administrator has, after the expiration of the proper period of time, filed his account for final settlement, the estate is, in a limited and conditional sense, finally settled. The only condition, in such a case, is that the account shall be found to contain a full and correct exposition of the condition of the estate at the time it was filed, and to show that the business of the estate has been apparently com-

pleted. The filing of the final account is the commencement of proceedings for final settlement, and the intervening death of the executor or administrator does not necessarily abate the proceedings thus instituted, which, when consummated, thus become an entirety. Having in view the evident purpose which moved the Legislature to enact section 2310, from which we have quoted, we construe so much of that section as is connected with the phrase under consideration to mean, that if a claim is not filed thirty days before *the account for final settlement is presented*, at a time and in the manner authorized by law, it shall be barred. Any other construction might result in an unreasonable procrastination in the final settlement of an estate by the presentation and allowance of claims after the assets are exhausted and the final account is filed, thus compelling either a withdrawal or the rejection of such final account and a readjustment of, or a deficiency in, the assets of the estate, to the possible great injury of the executor or administrator, as well as of others. Spencer's answer, consequently, presented a good defence in bar of the claim.

The second paragraph of the reply charged that the personal representatives of Thornton, the decedent, fraudulently concealed the claimant's cause of action until the 16th day of November, 1885; that on that day the claimant, acting through his attorneys, wrote to the widow of the decedent, requesting a settlement of his claim; that some time thereafter an attorney for the estate, who resided at New Castle, in Henry county, visited the claimant's attorneys, who resided at Anderson, in Madison county, and begged them not to file the claim against the estate, on the ground that such a proceeding would cause needless trouble and expense, and that the claim could in some way be better compromised and amicably adjusted; that said attorney for the estate also insisted that the attorneys for the claimant, instead of filing the claim against the estate, should visit the personal representatives of the decedent at New Castle and first see if

some amicable arrangement could not be made for the payment or satisfaction of the claim, which the last named attorneys agreed to do; that by reason of said agreement the filing of said claim was postponed; that when said agreement was made said attorneys for the claimant were otherwise professionally engaged, and that said professional engagement continued for several weeks thereafter; that, in the mean time, they received notice of the filing of the account for final settlement of the estate; that they thereupon at once proceeded to file the claim as stated in the answer; that by reason of the premises the said Spencer, as executor of the estate, was estopped from asserting that the claim was not filed in time to entitle it to be heard upon its merits.

The cause of action having been discovered at so late a period after the death of the decedent, reasonable diligence required that the claimant should have filed his claim against the estate at the earliest moment practicable after the discovery of its existence.

A mere previous professional engagement on the part of his attorneys did not excuse the claimant for not promptly looking after and filing his claim, if he intended to rely upon his strictly legal rights. The court did not, therefore, err in sustaining a demurrer to this paragraph of the reply.

The third paragraph of the reply only presented in an inverse form the same question raised by the answer. There was, consequently, no error in also holding that paragraph to be insufficient upon demurrer.

The judgment is affirmed, with costs.

Filed Oct. 11, 1887.

119	91
114	405
116	252
117	16
120	343
112	91
138	504
112	91
140	161
112	91
149	354
119	91
153	90

No. 12,115.

JOHNSON v. MOORE.

PLEADING.—*Action to Cancel Note and Mortgage.—Not Necessary to File Such Instruments with Complaint.—Exhibit.*—In an action to cancel a note and mortgage, it is not necessary that such instruments be made part of the complaint or filed therewith as exhibits.

PAYMENT.—*Acceptance of Notes as Such.—Cancellation of Mortgage.—Defence.*—Where a mortgagee receives the notes of a third party, importing a consideration, agreeing to accept them in payment of the mortgage debt, such payment, in the absence of fraud, is valid, and the mortgagor may maintain an action for the cancellation of his indebtedness and the mortgage securing it. In such case, the defence that the notes received were worthless, or that there was fraud, if available at all, can only be made so by answer.

PRACTICE.—*Motion.—Rejection of.*—Where a motion shows on its face a right to the relief it asks, it can not be rejected on the motion of the adverse party.

SAME.—*Nunc pro Tunc Entry.—Memorandum of Record.*—A paper containing a calculation made by the judge who tried the case, and which was by him certified to have been filed and treated as a paper in the case, is such a memorandum of record as authorized a *nunc pro tunc* entry correcting the amount of the judgment.

From the Huntington Circuit Court.

G. W. Harvey, for appellant.

N. Morris and *L. Newberger*, for appellee.

ELLIOTT, J.—The appellee sought by his complaint to secure the cancellation of a note and mortgage held by the appellant.

The complaint does not file the note and mortgage as exhibits, nor set them forth, but it is not for this reason bad on demurrer. These instruments are not the foundation of the suit, and are not within the rule requiring written instruments to be made part of the complaint. No recovery is sought on the note or mortgage; but, on the contrary, the object of the suit is to secure their legal destruction.

The complaint alleges that the appellant received from the appellee, as collateral security, two promissory notes executed by Elisha B. Joy, and agreed to collect them, but that he failed to do so, and brought suit against the appellee on the note and mortgage he seeks to have cancelled. If the complaint did not go further than this, there might be some force in the appellant's point that it does not show that the notes of Joy could have been collected; but the complaint goes much further, for it avers that, after the suit was brought against the appellee on the note and mortgage he here seeks to have cancelled, it was agreed that the appellant should take the Joy notes in full payment. If, as the complaint avers, the note and mortgage were paid, then the appellee has a clear right to a decree for their cancellation.

The notes executed by Joy import a consideration and presumptively were of value; and as the appellant agreed to accept them in payment of his claim, and got the consideration he contracted for, the payment is valid. *Wolford* v. *Powers*, 85 Ind. 294 (44 Am. R. 16). If the notes of Joy were worthless, or if there was fraud, these defences, if available to appellant at all, could only be made available by answer.

The appellant insists that the court erred in overruling his motion to reject a motion made by the appellee for a *nunc pro tunc* entry. If in any case a motion to reject a motion for a *nunc pro tunc* entry is proper, it certainly was not in this; for the motion, on its face, showed a clear *prima facie* right to the relief asked. Where a motion shows on its face a right to the relief it asks, it can not be rejected on the motion of the adverse party.

The paper containing the calculation made by the judge who tried the case was by him treated and filed as a paper in the case, for he so certifies. We think, therefore, that there was a memorandum of record which authorized the *nunc pro tunc* entry, correcting the amount of the judgment. *Rhoads* v. *Commonwealth*, 15 Pa. St. 272; *Mattheson* v. *Grant*, 2

How. U. S. 263; *Frink* v. *Frink*, 43 N. H. 508; *Weed* v. *Weed*, 25 Conn. 337; *Hollister* v. *The Judges*, 8 Ohio St. 201.

Judgment affirmed.

Filed Sept. 29, 1887.

No. 13,703.

The Jeffersonville, Madison and Indianapolis Railroad Company et al. v. Dunlap.

Statute.—*Repeal by Implication.*—Repeals by implication are not favored, but if a portion of a later statute will be destroyed by continuing any of the provisions of a prior one in force, the latter, to that extent, will be deemed repealed, notwithstanding a declaration in the later act that the prior one shall remain in force.

Railroad.—*Fencing Right of Way.—Act of April 13th, 1885, Did not Repeal Prior Statute.—Liability for Animals Killed.*—The act of April 13th, 1885 (Acts 1885, p. 224), relating to the fencing of railroad rights of way, did not repeal by implication the prior act on the same subject (R. S. 1881, section 4025, *et seq.*), and for a failure to fence at all places required by the prior statute, railroad companies are liable as previously, except so far as farm crossings and gates are concerned.

Same.—*Joint and Several Liability of Owner and Lessee.—Incorporated Towns.—Platted Portions.—Procedure.*—The prior statute not being repealed, the corporation owning a railroad, and its lessee, etc., are jointly and severally liable for the killing of animals upon the track thereof within such portions of an incorporated town as are laid out and platted, if the right of way could have been fenced at the place of the killing, and the manner of commencing and prosecuting actions and of collecting judgments is the same as formerly.

Same.—*Injury Must be Done by Cars or Engines.*—Under the act of April 13th, 1885, as well as under the prior act, railroad companies are not liable for the injury or killing of animals unless injured or killed by the cars or engines.

From the Johnson Circuit Court.

S. Stansifer, for appellants.

S. C. Brown, *R. M. Miller* and *H. C. Barnett*, for appellee.

ZOLLARS, C. J.—It is conceded by the pleadings that appellee's animal was killed upon appellants' track by a train of cars, within the limits of an incorporated town "laid out and platted into lots and blocks."

Negligence is not charged, nor is it contended that the railway company might not have fenced its right of way at the place where the animal went upon the track and was killed. Appellee's claim is, that appellants are liable under the statutes in relation to fencing railway tracks by railway companies.

It is conceded by counsel for appellants, that unless the act of April 13th, 1885, Acts 1885, p. 224, repealed prior laws, R. S. 1881, section 4025, *et seq.*, and thus changed the duties and liabilities of railway companies in relation to fencing their tracks "within such portions of cities and incorporated towns and villages as are laid out and platted into lots and blocks," and through uninclosed and unimproved lands, the railroad companies are liable in this case. The case, therefore, turns upon the question as to whether or not the act of 1885 wrought such changes.

The first section of the act provides that any railroad corporation, lessee, assignee, receiver, or other person or corporation, running, controlling or operating, or that may hereafter construct, build, run, control or operate any railroad into or through this State, shall, within twelve months from the taking effect of the act, etc., build and thereafter maintain fences, etc., on both sides of such railroad throughout its entire length, except at the crossings of public roads and highways, and within such portions of cities and incorporated towns and villages as are laid out and platted into lots and blocks, and except where the road runs through unimproved and uninclosed lands.

It is further provided, that where such lands become improved and inclosed on three sides, the railroad company, etc., shall build and maintain a fence along its right of way. And still further, it provides that such company, etc., shall

construct and maintain barriers and cattle-guards at all public roads and highway crossings, and that, on failure to perform the requirements of the act, the railway corporation, or person operating the road, shall be liable for all damages which may be done by the agents, employees, engineers or cars of such corporation or person operating the road, to any cattle, horses, etc., thereon.

The second section provides that, if the railroad company, etc., shall fail to fence its track, as in the first section required, the owner of land abutting on the right of way of the railroad company may, after a prescribed notice to the railroad company, etc., construct the fences and cattle-guards and collect from the railroad company, or person operating the road, the reasonable value of such fences and cattle-guards.

The third section provides that if the railroad company, etc., shall fail to keep the fences and cattle-guards in repair, the owner of land abutting on the right of way, after a prescribed notice to the railroad company, etc., may repair the same and collect from the company, etc., the value of such repairs.

The fourth section is as follows: "Nothing in this act contained shall in any manner affect or change the liability of railroad corporations, or of the assignees, lessees, or receivers of such corporations, for stock killed or injured upon their railroads; but such liability shall exist and be governed by laws now in force the same as if this act had never been passed."

This section four, we have concluded, was intended to continue the prior statute in force (section 4025, *et seq.*, R. S. 1881), and was designed as a declaration of the legislative intention in that regard.

The important question then is, how far may it or does it do so?

If, in any particular, it is impossible for both statutes to remain in force—if, in other words, to continue any portion

of the prior statute in force will destroy any portion of the act of 1885, it must be held that to that extent the prior statute is not in force, notwithstanding the declaration in section four that it shall remain in force. *Deisner* v. *Simpson*, 72 Ind. 435.

On the other hand, repeals of statutes by implication are not favorites of the law, and will take place only to the extent that the new law is in irreconcilable conflict with the prior law.

It was held in the case of *Blain* v. *Bailey*, 45 Ind. 165, that "It is a maxim in the construction of statutes, that the law does not favor a repeal by implication, and it has accordingly been held that where two acts are seemingly repugnant, they must, if possible, be so construed that the later may not operate as a repeal of the former." And it was said that, in pursuance of that maxim, it has been held that an act is not repealed by implication when the Legislature had no intention to repeal it, citing *Tyson* v. *Postlethwaite*, 13 Ill. 727.

In the case of *Coghill* v. *State*, 37 Ind. 111, this court quoted with approval the following from Mr. Sedgwick's work on Statutory and Constitutional Law: "So in this country, on the same principle, it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together." See, also, *City of Evansville* v. *Summers*, 108 Ind. 189, and cases there cited. And so, as said in the case of *Yost* v. *Conroy*, 92 Ind. 464, 472, it is competent for the Legislature to declare that former acts shall not be deemed repealed, and when this declaration is made courts will carry

it into effect wherever it can possibly be done without disregarding the provisions of the later act.

The Legislature has in several instances passed laws upon particular subjects, and at the same time declared by the same enactment that prior laws upon the same subject should not be repealed, but continued in force. In each instance this court has so far upheld the legislation as to hold both acts to be in force, where to continue the former act in force would not destroy the later; and has also held the former act to be in force so far as the continuing of it in force would not destroy the whole or any portion of the later act. Such acts have been passed and upheld in relation to drains and gravel roads. *Yost* v. *Conroy, supra; Robinson* v. *Rippey*, 111 Ind. 112, and cases there cited; *Deisner* v. *Simpson, supra.*

It has been said that repeals by implication rest upon the principle that the enactment of a new law covering the whole subject-matter of a prior law is an expression of an intention on the part of the Legislature to repeal the prior law, but that it can not be said that the passage of such subsequent law is the expression of such intention where it is positively declared that the later act shall not repeal the prior act upon the same subject. *Robinson* v. *Rippey, supra.* And hence, as we have stated, it is the duty of the courts to uphold both statutes if possible, and thus give effect to the expressed intention of the Legislature. May that be done here to any extent, and if so, how far?

The title of the act of 1863 (Acts 1863, p. 25; R. S. 1881, section 4025, *et seq.*) is an act to provide compensation to the owners of animals killed or injured by the cars, locomotives, or other carriages of any railroad company, and to enforce the collection of judgments rendered on account of the same. The act provides in detail for the commencement and prosecution of cases against railway companies for the injury and killing of animals, and prescribes a special and somewhat

summary method of collecting judgments obtained in such actions.

Section one as amended in 1877, R. S. 1881, section 4025, provides that the company, lessee, assignee, receiver, or other person or corporation running, controlling or operating the railroad, shall be liable jointly and severally, etc.

Another section provides that the act shall not apply to any railroad securely fenced in and such fence properly maintained by such company, etc.

As said in the recent case of *Pennsylvania Co.* v. *Spaulding*, *ante*, p. 47, that act did not, and, if still in force, does not, positively enjoin upon railway companies the duty of fencing their tracks, but made them liable, and, if in force, still makes them liable, for the injury and killing of animals upon the railroad track, where the road is not, but might and ought to be, fenced.

Whatever duty, then, there was or is in that regard on the part of the railway company under that act resulted, and still results, from the liability imposed.

By judicial interpretation, and in meeting constitutional objections urged against the act, it has been declared that one purpose of the act was to protect the public travelling in cars over the railroad. *New Albany, etc., R. R. Co.* v. *Tilton*, 12 Ind. 3; *New Albany, etc., R. R. Co.* v. *Maiden*, 12 Ind. 10; *Indianapolis, etc., R. R. Co.* v. *Guard*, 24 Ind. 222 (87 Am. Dec. 327); *Baltimore, etc., R. W. Co.* v. *Johnson*, 59 Ind. 188; *Cincinnati, etc., R. R. Co.* v. *Hildreth*, 77 Ind. 504.

Under similar statutes in other States it has been declared that the penalty was designed as an inducement for railway companies to fence their tracks. The purpose of the act, as declared by the title, was to provide compensation to the owners of animals injured or killed by the cars, locomotives, etc., and to enforce the collection of judgments rendered on account of the same. The act, then, was not designed wholly to provide compensation to the owners of animals killed by

cars, etc., nor wholly for the protection of the travelling public. That it was not designed wholly for the latter purpose is settled by the title, and by our cases holding that the owner of animals for whose convenience farm crossings and gates are maintained can not recover, if by his neglect the gates are left open and his animals go through them to the track and are there injured or killed. *Hunt* v. *Lake Shore, etc., R. W. Co., ante,* p. 69, and cases there cited.

If the act was designed wholly for the protection of the public, the railway company would be liable, although animals might pass to the track through such farm gates. To repeat, then, the act of 1863 (section 4025, *et seq.*, R. S. 1881), was designed to protect the public travelling in cars over the railroad, and to provide compensation to the owners of animals injured or killed by cars, etc., upon railroads.

It seems clear that the act of April 13th, 1885, was not designed simply for those purposes. The leading purpose of that act, as manifested by the title and the whole act, was to enjoin a positive duty upon railway companies to fence their tracks at the places therein specified; in other words, to give to the owner of adjoining enclosed and improved lands the right to demand and have a fence built and maintained between his land and the railway.

Under the former act, as the duty on the part of the railway company to fence its track resulted simply from the liability imposed for the injury or killing of animals, the adjoining land-owner had no means of enforcing the performance of the duty except by suits for the injury or killing of his animals by cars, etc., upon the track. He might recover for such injury or killing, but he had no means of compelling the railway company to build fences, nor of compelling it to pay for fences built by him.

The railway company might, as has been the case, neglect and refuse to build fences, and take its chances as to the amount that might be recovered from it for the injury or killing of animals. And thus the farmer's field might re-

main uninclosed on the side adjoining the railway, leaving his growing crops liable to devastation by the animals of others at large, unless he built fences himself. His animals might constantly escape and stray away, and yet he could have no recompense for the annoyance and loss.

To enable him to have fences built, either by or at the expense of the railway company, between his enclosed and improved lands and the railway, and thus escape the annoyances and losses above suggested, the act of April 13th, 1885, was, in the main, passed. And because the act was intended, principally, for the benefit and protection of owners using and farming adjacent enclosed and improved lands, it does not require the railway company to build and maintain fences along uninclosed and unimproved lands and in platted portions of cities, towns and villages which are not supposed to be used for farming purposes.

If that act absolutely repealed the prior act, there is no law which directly or indirectly imposes upon railway companies the duty of fencing their tracks within any portions of cities, towns or villages which may be platted into lots, nor through uninclosed and unimproved lands. There must be a considerable portion of each of the railroads in the State which pass through uninclosed and unimproved lands. And as in many places animals are allowed to run at large by order of the county boards, the result will be that the idea of compensation for animals killed upon railroads, and the idea of protecting the public travelling on railway cars, by requiring railway companies to fence their tracks, have been largely abandoned by the Legislature. We do not think that such was the intention of the Legislature in the enactment of 1885. Nor do we think that there is anything in that act that requires a holding that the prior act, in all its parts, is repealed, or that it can not remain in force without destroying the later act.

In the State of Missouri there was an act very similar to the act of 1885. The act there required railway companies

to erect and maintain fences on the sides of their tracks where the same passed through, along or adjoining enclosed or cultivated fields, or uninclosed prairie lands, and provided that until such fences should be built and maintained by the railway companies they should be liable in double the amount for all damages which might be done by their agents, engines or cars to animals going upon the track at places where such fences were required. It also provided that, in case the railway company should fail to build the fences as required, the adjoining land-owner might build them and collect the expense of the building from the railway company. Wagner's Missouri Statutes, published in 1872, vol. 1, p. 310.

It will be observed that the act did not require fences through or along uninclosed lands, except prairie lands; so the Supreme Court of that State held.

There was another statute (same volume of statutes, page 520), which, like our act of 1863, did not positively impose upon railway companies the duty of fencing their tracks, but, like that act, imposed a liability for the injury or killing of animals going upon the track, and provided that the act should not apply to any railway enclosed by a lawful fence. Those acts were both held to be in force, the one not conflicting with the other.

In the case of *Tiarks* v. *St. Louis, etc., R. R. Co.*, 58 Mo. 45, it was said that the first act above made it obligatory upon all railroads in the State to erect and maintain fences on the sides of the road, where the same passed through, along, or adjoining enclosed or cultivated fields, or uninclosed prairie land; and that until such fences should be built the corporation was made liable in double the amount for all damages by its agents, engines or cars to all animals on the road. Of the act last above mentioned, it was said that it was designed to furnish an inducement for the roads to fence their tracks where it was not deemed absolutely necessary to compel them to do so; that by that act, if the road was not fenced, and

animals were killed at a place where the law did not require fences to be erected, the corporation was still liable.

The same ruling was made in the recent case of *Radcliffe* v. *St. Louis, etc., R. R. Co.*, 7 West. Rep. 305, and it was there held again, that the act was not restricted in its application to cases of injury occurring at points where the companies were required to fence by the first act, but was general, giving the right to sue for an injury occurring anywhere on the road, except where it was enclosed by a lawful fence or crossed by public highways—in other words, that the act applied to any part of the road where the company had a *right* to maintain fences, although not required to do so by the other act.

Those cases are authority here. For the purposes of this case it would be sufficient to hold that so far as concerns portions of the railway, other than those portions required to be fenced by the act of April 13th, 1885, the prior act (section 4025, *et seq.*, R. S. 1881,) is still in force, and that in order to escape liability for the injury or killing of animals upon such portions, the railroad must be there fenced, as heretofore held by this court.

Appellants' counsel suggests this difficulty: Under the prior act there is no liability unless the animal is struck by the cars or engine. The act of 1885 provides that, on the failure to fence the railroad as therein required, the railway company, etc., "shall be liable for all damages which may be done by the agents, employees, engineers, or cars of such corporation * * * to any such cattle, * * * and other stock thereon."

It is argued that under the above act, and the language above quoted, there may be a liability although the animal may not be struck by the cars, or engine, but it is not suggested just how the damage to the animal may be done by the engineer, etc., except by running a train of cars upon it. The above quoted language of the act is confused and uncertain, but, after much thought upon the whole subject, we

think that it was not the intention that railway companies shall be liable for the injury or killing of animals, unless they are injured or killed by the cars or engines. We are led to this conclusion from two considerations. In the first place, the language is that the corporation shall be liable for the damage done by the engineers, etc., and cars "thereon." That seems to indicate that the animal must be injured on the track, and if so, it is reasonable to conclude that the intention was that the injury should be done by the engine or cars as formerly. In the second place, the main purpose of the act was not, as we have seen, to provide compensation to the owners of animals, but to secure fences to the land-owners. The probability is, that the portion of the act fixing liability for the injury or killing of animals was inserted as a matter of precaution, to avoid a possible doubt of the liability as it then existed. But if the suggestion of appellants' counsel as to the construction of that portion of the act should be adopted, it would not be a sufficient reason for holding that the prior act was totally repealed. To so hold would lead to much more serious difficulties.

The former act provides that the corporation owning the road, and the lessees, etc., shall be jointly and severally liable. If that act is repealed, there is no longer such joint liability.

The prior act provides where and how suits for the injury or death of animals may be brought, and prescribes a special, and, as we have said, a somewhat summary method of collecting judgments that may be obtained for the injury or killing of animals. If that act is repealed, there is nothing special left as to the place and manner of prosecuting such suits, and the owner of the animal must collect his judgment in the ordinary way.

If the former act is repealed, a considerable portion of each railroad in the State may be, and remain, without fences, and the two purposes which led to the legislation—compensation to the owners of animals injured or killed upon such

road, and the safety of the public travelling in cars thereon—will be largely thwarted.

Our conclusion upon the whole case is, that, notwithstanding the act of 1885, the corporation owning the railway, and the lessees, etc., are jointly liable for the injury or killing of animals, as formerly; that the manner of commencing and prosecuting actions for the injury or death of animals, and the manner of collecting judgments obtained, are the same as formerly; and that for a failure to fence, at all places required by the prior act, railway companies are liable for the injury and death of animals as formerly, except as to farm crossings and gates, the duty of keeping them closed having been expressly transferred, by the acts of 1885, from the railway company to the land-owner. In other words, while, under the old law, the duty to fence the railway results from the liability imposed, and under the new, the duty to fence the portions of the road therein specified is positively enjoined, yet, the liability for the injury and killing of animals being the same, there is no sufficient reason why the old law may not be held to be in force as to the whole line, except, as already stated, so far as concerns farm crossings and gates.

The court below having held that appellants are liable, and having rendered judgment accordingly, the judgment is affirmed, with costs.

Filed Oct. 15, 1887.

No. 13,755.

Droneberger *v.* The State.

Criminal Law.—*Nuisance.—Affidavit and Information.—Requirements of.*—In an affidavit and information charging the erection and maintenance of a nuisance, by erecting and maintaining near the dwelling-houses of divers inhabitants of the county a building in which were kept, fed and slaughtered large numbers of chickens, etc., and in and about which was deposited offal, thereby creating noisome smells, etc., it is not necessary to describe the particular location of the alleged nuisance, nor is it necessary to set out the names of the persons near whose dwelling-houses the same was maintained.

Same.—*Unnecessary Averments as to Matters of Description Must be Proved as Alleged.*—Matters of description in an information for the maintenance of a nuisance, as to the exact location of the same, and as to the names of the persons whose dwelling-houses are contiguous thereto, though immaterial and unnecessary, must, if set out, be substantially proved as alleged.

From the Clinton Circuit Court.

J. V. Kent and *M. Bristow*, for appellant.

M. B. Beard, Prosecuting Attorney, and *W. A. Staley*, for the State.

Mitchell, J.—The appellant was charged and found guilty of having unlawfully erected and maintained a public nuisance, in Clinton county, by erecting and maintaining near the dwelling-houses of divers inhabitants of the county a building and appurtenances, in and about which he kept, fed and slaughtered large numbers of chickens, geese and ducks, and in and about which was deposited offal from the slaughtered poultry, thereby creating noisome and unwholesome smells, etc., to the damage and nuisance of all the inhabitants of the State then and there being and residing, etc.

An objection is taken to the affidavit and information, because they do not point out and specifically describe the particular location of the alleged nuisance.

This was not necessary. No useful purpose would be subserved by stating the exact location of a nuisance, unless there was a request for an order abating the alleged offensive thing or structure. *Wertz* v. *State*, 42 Ind. 161; *Howard* v. *State*, 6 Ind. 444.

A further objection to the affidavit and information is, that the names of the persons near whose dwelling-houses the alleged nuisance was erected and maintained are not given.

It has been repeatedly ruled that statements of that character are matters of description merely, and not of venue, and that although they are immaterial and unnecessary, yet if made they must be proved substantially, some of the cases say precisely, as made. *Dennis* v. *State*, 91 Ind. 291; *Mergentheim* v. *State*, 107 Ind. 567.

The appellant filed an affidavit upon which he moved the court for a change of venue from Clinton county, on account of the bias and prejudice of the citizens. We are unable to tell from the record whether the motion was overruled or withdrawn. Nothing is disclosed one way or the other. It is immaterial, however, as the case is one in which the granting or refusing a change of venue is wholly within the discretion of the court. Section 1771, R. S. 1881.

Finally, it is contended that the verdict was not sustained by the evidence, in that the proof failed to show that unwholesome and offensive smells were emitted from the appellant's building and premises.

An examination of the record, however, makes it readily apparent that, under the rule of this court, the verdict can not be disturbed for want of evidence.

Judgment affirmed, with costs.

Filed Oct. 15, 1887.

No. 13,930.

Rubush v. The State.

118	107
116	457
119	831
119	107
194	96
194	587
194	541
112	107
146	126
112	107
169	688

Recognizance.—*Forfeiture.—Action on.—Complaint.—Pleading.*—A complaint in an action on a forfeited recognizance, which alleges that the recognizance was adjudged by the court to be forfeited, and the forfeiture duly entered of record, is sufficient without an additional averment that the surety was called and required to bring in the body of his principal.

Same.—*Forfeiture May be Adjudged on later Day of Term than Named in Recognizance.—Practice.*—Where a recognizance is conditioned that the principal shall appear on the first day of the next term of the circuit court, and abide the orders of court therein, and where the cause is continued and set down for trial at a subsequent day in the term, the court may, on such latter day, legally adjudge the forfeiture of such recognizance, as to both principal and surety, upon the failure of the former to appear and answer.

Same.—*Action on.—Defence.—Alteration of Indictment.*—In an action upon a forfeited recognizance, an answer which avers that the indictment against the principal therein was returned in January, 1887; that such indictment charged him with the commission of a felony in December, 1887; that after a plea of not guilty thereto, the same, without the knowledge of either principal or surety, was changed and altered by the prosecuting attorney by the erasure of the figure 7 in the year 1887, so as to make the same read "1886," is bad on demurrer. Such alteration would not affect the validity of the indictment, nor vitiate the warrant issued thereon or the recognizance executed by the prisoner.

Same.—*Evidence.*—In an action on a forfeited recognizance, where, in the original proceeding, a *nolle prosequi* had been entered to the indictment, and the prosecuting attorney had been ordered by the court to prepare and file an information against the defendant, charging him with the offence described in the indictment, the affidavit and information so prepared are competent evidence.

Record.—*Collateral Attack.—Complaint.*—A record can not be impeached collaterally by the allegation of matters *dehors* the same, unless the complaint states what is shown by the record in relation to such matters.

From the Knox Circuit Court.

W. A. Cullop, G. W. Shaw and *J. T. Goodman*, for appellant.

L. T. Michener, Attorney General, *J. C. Adams*, Prosecuting Attorney, and *J. H Gillett*, for the State.

HOWK, J.—This was a suit by and in the name of the State of Indiana, as plaintiff, against the appellant and one Jacob Rubush, as defendants, upon a forfeited recognizance. The cause was put at issue and tried by the court, and a finding was made for the State against appellant in the full amount of the bond in suit. Over motions for a new trial and in arrest, the court rendered judgment upon and in accordance with its finding herein.

By an assignment of error that the State's complaint does not state facts sufficient to constitute a cause of action, and by another error predicated upon the overruling of his motion in arrest of judgment, appellant challenges here the sufficiency of such complaint.

The State alleged in its complaint that, at the January term, 1887, of the court below, the grand jury of Knox county returned into open court an indictment against defendant Jacob Rubush, charging him with an assault and battery upon Cora Barton, with intent to forcibly commit a rape upon her, and against her will; that, upon a warrant issued thereon, defendant Jacob Rubush was arrested by the sheriff, and, to procure his release from imprisonment, he executed his recognizance, with appellant, George A. Rubush, as his surety, whereby they each acknowledged themselves to owe the State of Indiana five hundred dollars, conditioned to be void if defendant Jacob Rubush should appear to such indictment on the first day of the next term, and abide the orders of court therein; that such recognizance was executed in open court, and accepted and approved by the court, on the 9th day of February, 1887; that defendant Jacob Rubush was then and there released from the custody of the sheriff; that, on the first day of the March term, 1887, said cause was continued to, and set down for trial on, the 15th day of March, 1887, on which day defendant Jacob Rubush did not appear; whereupon, by order of the court, defendant Jacob Rubush was three times called, but came not and made default; that said recognizance was, by the court, then

and there forfeited, and the forfeiture thereof duly entered of record; and that no part of the amount due on said recognizance had been paid. Wherefore, etc.

Appellant did not demur to the complaint herein for any cause, but he questions the sufficiency of the facts stated therein, after the trial and finding of the court, by his motion in arrest, and, after his appeal to this court, by his assignment here as error that such facts were not sufficient to constitute a cause of action.

It is first insisted by appellant's counsel that the complaint is bad, because it fails to show by any of its averments that appellant was called and required to bring in the body of his principal, Jacob Rubush, or that he had made default in performing the conditions of the recognizance. This point is not well taken. It was alleged in the complaint that the recognizance was adjudged by the court to be forfeited, and the forfeiture thereof duly entered of record. With this averment of forfeiture therein, the complaint would have been sufficient even if appellant had demurred thereto for the want of facts, and it is good without doubt when questioned, as it was, for the first time, by his motion in arrest of judgment. The averment that the recognizance was by the court then and there forfeited, and the forfeiture thereof duly entered of record, necessarily "implies that the proper steps authorizing such forfeiture had been taken." *Gachenheimer* v. *State*, 28 Ind. 91; *Fowler* v. *State*, 91 Ind. 507; *Friedline* v. *State*, 93 Ind. 366.

In Moore's Criminal Law, section 237, it is said that in a complaint upon a forfeited recognizance, it is necessary to aver that the surety therein had been called and made default. Moore says: "It (the complaint) must show that the principal was three times called, and then made default, and that the bail was also three times called upon to bring the body of his principal into court in discharge of his recognizance, and made default therein, and that thereupon the bond was declared forfeited in due form of law. A complaint that

omits to aver such forfeiture is bad." In support of the text the learned author has cited the following cases from our own reports, which are also cited in the brief of appellant's counsel in support of their contention, namely: *Patterson* v. *State*, 12 Ind. 86; *Kiser* v. *State*, 13 Ind. 80; *Hawkins* v. *State*, 24 Ind. 288; *Gachenheimer* v. *State*, *supra*; *Hannum* v. *State*, 38 Ind. 32.

Upon examination of the cases last cited, it will be found, we think, that none of them go further than to hold, as we do, that the complaint in such a cause must allege the forfeiture of the recognizance by the proper court. This allegation, of itself, "implies that the proper steps authorizing such forfeiture had been taken." *Friedline* v. *State*, *supra*.

It is further claimed on behalf of appellant that the complaint herein was bad on his motion in arrest, because, while the recognizance was conditioned that Jacob Rubush should appear on the first day of the next term of the court below, which we know judicially was the 7th day of March, 1887, yet the complaint shows on its face that the recognizance was not forfeited by the court until the 15th day of March, 1887. In other words, it is claimed by appellant's counsel that the recognizance in suit could be forfeited only "on the first day of the next term," and not afterwards. This position can not be maintained. The recognizance was conditioned not only for the appearance of Jacob Rubush to such indictment on the first day of the next term, but also that he should "abide the orders of court therein." When, therefore, on the first day of the next term, "the cause was continued to, and set for trial on, the 15th day of March, 1887," by the order of the court, Jacob Rubush and his surety were bound, by the terms of the recognizance, that he should abide such order of court and appear to such indictment on the day last named; and when, on that day, he failed to appear, and made default, the court lawfully adjudged the forfeiture of such recognizance, as well against appellant, the surety therein, as against the principal, Jacob Rubush. *State* v. *Thompson*, 62

Ind. 367; *Fowler* v. *State, supra.* The complaint herein was amply sufficient, we think, to withstand either of the assigned errors whereby appellant has here challenged its sufficiency.

By several specifications of error, appellant calls in question here the decisions of the trial court in sustaining the State's demurrers to the second and third paragraphs of his answer herein. The first paragraph of his answer was a general denial of the complaint; and in each of the other two paragraphs of answer, he alleged special matters in bar of the State's cause of action herein. In the second paragraph of his answer, appellant admitted that at the January term, 1887, of the court below, an indictment was duly returned in court charging his co-defendant herein, Jacob Rubush, with an assault and battery upon one Cora Barton, with intent to commit a rape upon her, forcibly and against her will; that by virtue of a warrant, issued on such indictment, the sheriff of Knox county arrested said Jacob Rubush, and to procure his release from the custody of the sheriff, under such arrest, he and appellant, as his surety, executed the recognizance counted on in the State's complaint, on the 9th day of February, 1887, and Jacob Rubush was then released from custody; that, on the first day of the ensuing March term of such court, said cause was continued to, and set down for trial on, the 15th day of the March term, 1887, on which day Jacob Rubush did not appear in court to answer such indictment, nor to abide the order of the court thereon; and that thereupon, on the same day, such recognizance was by the court declared forfeited, and such forfeiture was duly entered of record, and the amount thereof was unpaid.

Appellant then set out, in such second paragraph of his answer, a copy of the indictment against Jacob Rubush, returned and filed in the court below on the 14th day of January, 1887, with all the endorsements thereon. The only object of the pleader, in setting out these copies, manifestly was to show that the indictment charged that Jacob Rubush committed the felony alleged therein, "on the 29th day of

December, 1887," a day which had not then arrived, and is yet in the future.

After setting out these copies, appellant averred that, after said indictment was so returned and filed as aforesaid, Jacob Rubush, the principal in the recognizance in suit, was arrested, and, on the — day of ——, 1887, upon arraignment on such indictment in court, for plea thereto said that he was not guilty as therein charged; that, after such plea was entered, on the — day of ——, 1887, said indictment was, without the knowledge or consent of Jacob Rubush or of appellant, and without order or leave of court, and without having been returned to the grand jury, changed, altered and amended by the prosecuting attorney, with the consent of the attorneys of Jacob Rubush, in this, namely: The date on which the offence was charged to have been committed in the indictment, to wit, the year "1887," was changed, altered and amended so as to read and be "1886," as it then appeared in said indictment, by erasing the final figure "7" and inserting in its place the figure "6." Wherefore appellant said he undertook, by the recognizance sued upon, that his co-defendant, the principal obligor, should appear in the court below and answer the charge preferred by the grand jury in said indictment; and that such indictment, as so returned, did not charge any offence known to the law, in that it charged Jacob Rubush with assault and battery, with intent to commit rape, at a time which had not come to pass when such indictment was so returned.

We are of opinion that the trial court did not err in sustaining appellee's demurrer to this second paragraph of answer. The indictment against Jacob Rubush, for the felony therein charged, was by no means a nullity by reason or on account of the palpable clerical error therein in charging the date of the commission of the offence. The whole scope and tenor of the indictment, and its grammatical construction, clearly show, and conclusively so, we think, that the grand jury intended to charge and did charge Jacob Rubush

therein with a felony by him committed prior to the finding and return of such indictment and the filing thereof in the court below. If he had gone to trial upon his plea of not guilty, and the evidence had shown that he committed the offence charged at any time within two years before the return and filing of the indictment herein, it is well settled that such an indictment, notwithstanding the palpable error in the date charged as the date of the commission of the offence, would be sufficient to sustain a judgment of conviction, even over a motion in arrest and error assigned thereon. Of such an error in the date of the commission of the offence charged, the very utmost that can be correctly said is, "That the indictment or information does not state the offence with sufficient certainty." This is the *fourth* statutory cause for quashing an indictment or information. Section 1759, R. S. 1881; *Dyer* v. *State*, 85 Ind. 525; *Murphy* v. *State*, 106 Ind. 96; *Trout* v. *State*, 111 Ind. 499.

Uncertainty in the statement of the offence charged, either in an indictment or in an information, whether caused by errors or discrepancies in dates or otherwise, affords no ground whatever for arresting judgment thereon. *Greenley* v. *State*, 60 Ind. 141; *Bright* v. *State*, 90 Ind. 343; *Graeter* v. *State*, 105 Ind. 271; *Trout* v. *State*, 107 Ind. 578.

The alleged alteration of the indictment, in changing the date of the commission of the offence charged therein, did not, we think, affect the validity of such indictment, nor vitiate the warrant issued thereon, or the recognizance executed to secure the release of Jacob Rubush from the custody of the sheriff under such warrant. If such change of date was authorized (and it does not appear that any one objected or excepted thereto in the court below), it can not be complained of here and in this cause.

It is alleged that the change of date was made without the knowledge or consent of the recognizors; but, for aught that is stated to the contrary in such paragraph of answer,

the record of that cause may show that such change was made with the knowledge and consent, and by the express authority, of both the recognizors. It is settled by our decisions that a record can not be impeached collaterally, by the allegation of matters *dehors* the same, unless the complaint states what is shown by the record in relation to such matters. *Reid* v. *Mitchell*, 93 Ind. 469; *Dowell* v. *Lahr*, 97 Ind. 146; *Exchange Bank* v. *Ault*, 102 Ind. 322.

But if the alleged alteration of the indictment, in changing the date of the offence charged therein, was wholly unauthorized, then the alteration is at most a mere spoliation of the indictment, which can not affect its validity, nor vitiate the recognizance executed to secure the release of the defendant from custody thereunder. Such spoliation of the indictment did not release the defendant from the charge therein, and, surely, did not release the recognizors from liability on their recognizance executed thereunder. *State, ex rel.*, v. *Berg*, 50 Ind. 496; *Harris* v. *State, ex rel.*, 54 Ind. 2; *Brooks* v. *Allen*, 62 Ind. 401.

The demurrer to the second paragraph of answer was correctly sustained.

In the third paragraph of his answer appellant alleged that, on the 15th day of March, 1887, and before the forfeiture of the recognizance in suit, Jacob Rubush, by his counsel, moved the court below, after having withdrawn his former plea of not guilty, to quash that part of the indictment which sought to charge him with the felonious intent therein mentioned, for defects apparent on the face of such indictment, which motion was sustained; that, during the pendency of such motion, the prosecuting attorney, with leave of the court, entered a *nolle prosequi* to the indictment so remaining, which charged only a misdemeanor, to wit, an assault and battery, and asked leave of the court to file thereafter an affidavit and information charging said Jacob Rubush with the same felony theretofore charged against him in said indictment; that in the afternoon of the same day, long after the aforesaid proceed-

ings on said indictment had been had by the court and duly entered in its minutes on the judge's docket, the prosecuting attorney filed in court said affidavit and information, charging Jacob Rubush with the commission of the aforesaid felony, and thereafter, on the same day, the recognizance in suit was forfeited by the court, as alleged in the State's complaint herein; that at the time of the *nolle* of said indictment as aforesaid, in the forenoon of the 15th day of March, 1887, the defendant Jacob Rubush was not in court in person, and the court made no order for him to remain in custody or on bail until the prosecuting attorney preferred in court another charge against him; that, at the time of the forfeiture of the recognizance sued upon, as alleged in the complaint herein, there was no such charge against Jacob Rubush as he was required by such recognizance to appear in court and answer, and there was no order of court requiring him to remain under bond after the quashing and *nolle* of said indictment as aforesaid, and by its terms he was then and there fully released and relieved from the penalty thereof; and that appellant, as the surety of said Jacob, ought to be released from, and was not liable for, the penalty of such recognizance, as the indictment under which it was taken had been fully disposed of by due process of law in the court below, and the State had dismissed its said prosecution against said Jacob Rubush. Wherefore, etc.

It needs no argument, we think, to show that the trial court committed no error in sustaining the State's demurrer to the third paragraph of appellant's answer herein, the substance of which we have given. In such paragraph of answer, appellant attacks collaterally the validity of the judgment below declaring the forfeiture of the recognizance in suit, and seeks to have such judgment reviewed and set aside.

It nowhere appears in the third paragraph of answer that the recognizors, or either of them, objected or excepted to any of the proceedings of the court which preceded and led

to the adjudication of forfeiture, or that they, or either of them, moved the court to modify or set aside such adjudication. It was not shown, therefore, that the errors, if any there were, in such proceedings and judgment were so saved in and presented by the record of such adjudication of forfeiture as that the recognizors, or either of them, can be relieved therefrom, either by an appeal or by bill of review. In rendering such adjudication the court below had jurisdiction as well of the parties as of the subject-matter; and for aught that is alleged to the contrary in the third paragraph of answer, such adjudication was, and must be held to be, whether erroneous or not, final and conclusive as to all matters which were, or might have been, then litigated. *State, ex rel.*, v. *Berg, supra; Harris* v. *State, ex rel., supra; State* v. *Wenzel*, 77 Ind. 428.

Under the alleged error of the court in overruling appellant's motion for a new trial, his counsel insist that the court erred in admitting in evidence, over his objections, the affidavit and information against Jacob Rubush filed by the prosecuting attorney after he had entered a *nolle prosequi* to the indictment charging the same offence.

It is shown by the record that the admission of this evidence was objected to by appellant solely on the ground that it did not tend to prove anything under the issues in this cause; or, in other words, that it was not relevant to such issues. If this objection to the evidence were well taken, it would not authorize us to reverse the judgment below. The cases are few, if there be any, where the admission of irrelevant evidence would afford any sufficient ground for the reversal of the judgment, and especially so where, as here, the issues of fact were tried by the court, and not by a jury. But, in this case, such affidavit and information were competent, and, as offered, were properly admitted in evidence. They were a part of the proceedings of the court in quashing part, and entering a *nolle* to the remainder, of the original indictment against Jacob Rubush; for such proceedings

were immediately followed by an order of court "that the prosecuting attorney prepare and file an information upon a proper affidavit, charging the defendant (Jacob Rubush) with an assault and battery upon the person of Cora Barton, with intent to commit a rape, as aforesaid."

The motion for a new trial was, we think, correctly overruled.

The judgment is affirmed, with costs.

Filed Nov. 15, 1887; petition for a rehearing overruled Dec. 21, 1887.

No. 13,617.

SERTEL v. GRAETER.

PRACTICE.—*Supreme Court.—Appeal.—Motion for New Trial.—Bill of Exceptions.*—Where one of the causes relied on in a motion for a new trial is the rejection of offered evidence, the motion must specifically indicate the evidence offered and excluded, and the bill of exceptions must show that the evidence offered was that indicated in such motion.

From the Knox Circuit Court.

H. S. Cauthorn and *J. M. Boyle*, for appellant.

J. S. Pritchett, *W. A. Cullop* and *G. W. Shaw*, for appellee.

ELLIOTT, J.—One of the points relied on for a reversal of the judgment in this case is that the trial court erred in refusing to permit testimony offered by the appellant to be introduced.

It is answered by the appellee by the assertion that the motion for a new trial specifies, as the erroneous ruling of the

court, the refusal to admit plans and specifications in evidence, while the bill of exceptions shows that the offer was of parol evidence to prove the contents of the plans and specifications.

The record sustains the appellee as to the fact, and the law is with him. The motion for a new trial must specifically indicate the evidence offered and excluded, and the bill of exceptions must show that the evidence offered was that indicated in the motion. *Bruker* v. *Kelsey*, 72 Ind. 51.

There is evidence sustaining the finding upon all material points, and it must remain undisturbed.

Judgment affirmed.

Filed Oct. 18, 1887.

112 118
114 449

No. 12,902.

The Fort Wayne, Cincinnati and Louisville Railroad Company v. Woodward.

Railroad.—*Right of Way.—Liability for Killing Animals Turned into.—Fence.—Private Gate.*—Where one habitually turns his horses into the right of way of a railroad company, through a gate maintained for his accommodation, in order that they may reach a pasture field adjoining the right of way, between which and the latter there is no fence, he can not recover their value if killed.

From the Allen Circuit Court.

W. H. Coombs, *R. C. Bell* and *S. L. Morris*, for appellant.

W. G. Colerick, for appellee.

Mitchell, J.—Conceding that the complaint stated facts sufficient to constitute a cause of action, we have concluded,

after an attentive consideration of the evidence in the record, that the judgment of the circuit court is not sustained by the proof.

The case made is, briefly, as follows: The plaintiff was in the habit of pasturing his horses on a narrow strip or tract containing about four acres of land, lying lengthwise along the appellant railway company's right of way, in Wells county. This strip of ground was securely fenced all round, except that there was no fence between it and the company's right of way. In order to gain access to the pasture a gate had been erected, and was being maintained with the company's permission, through a fence erected by the company along a public highway over which its right of way had been laid.

It had been the plaintiff's habit to turn his horses from the highway through the gate thus maintained, and to allow them to pass thence along and over the company's right of way some ten or twelve rods, until they reached a point where they could pass from the right of way on to the pasture lot, which lay in common with the right of way.

It is to be inferred that the gate was erected and maintained by and for the benefit of the owner of the pasture lot. It was the plaintiff's custom to observe when the last train, as he supposed, passed over the railroad in the evening, after which he would turn his horses through the gate, and allow them to go to the pasture in the manner above described. His habit was to take them out of the pasture over the right of way and through the gate in the morning, in advance of the passage of the first train. On the evening of August 23, 1885, the appellant turned two horses owned by him through the gate on to the company's right of way. He watched them until they passed over and from the right of way into the pasture field. At some time during the night the animals wandered back upon the right of way, and in the morning one was found dead and the other severely

injured, from contact with a passing train on the appellant's track.

Upon the foregoing undisputed facts, was the company liable to the appellant for not having fenced its track in compliance with the act approved April 13th, 1885?

That it was the duty of the company to maintain a sufficient fence between its right of way and the appellee's pasture field, is plain, and that it was in default in not maintaining a fence as required by the statute, may be conceded. It may be conceded, too, as a general proposition, that an adjacent land-owner can not be deprived of the proper use of his land by the default of a railroad company in neglecting to fence its track. The land-owner may now, after having given thirty days' notice to the company in default, erect fences at the company's expense at all places where the statute requires railroads to maintain fences. It may be, too, although we decide nothing upon that subject now, that if a land-owner uses his enclosed lands in the ordinary way, and his animals escape on to the track of a railway company, which is not fenced as the statute requires, the knowledge of the land-owner that the track was not fenced will not defeat his statutory right of recovery. It has been held that contributory negligence is no defence in such a case. *Louisville, etc., R. W. Co.* v. *Cahill*, 63 Ind. 340; *Welty* v. *Indianapolis, etc., R. R. Co.*, 105 Ind. 55.

To habitually turn animals loose upon a railroad track or right of way is, however, something more than contributory negligence. Such conduct evinces a disposition to abandon the animals to the hazard of certain and inevitable destruction sooner or later.

"A man who willingly abandons his property to destruction, or purposely exposes it to a known danger, has no right, either in law or morals, to invoke the assistance of the courts of justice to secure pay for it." *Welty* v. *Indianapolis, etc., R. R. Co., supra.*

The plaintiff must have known, when he allowed his horses to go over the appellant's right of way to the pasture field, that the instinct of the animals would naturally lead them to come back from the pasture on to the right of way and up to the gate through which they customarily gained access to and egress from the field. In respect to the owner who thus treats his animals, if the railroad track is securely fenced at the point where he voluntarily turns them loose upon the right of way, he may not complain. Having chosen the company's right of way as a convenient way for his horses to go to and from the field, he is in no position to claim compensation for injuries to which he voluntarily exposed them.

In the recent case of *Louisville, etc., R. W. Co.* v. *Goodbar*, 102 Ind. 596, this court said: "It would be unjust to compel a railroad company to pay for animals that entered upon its track through a gate maintained by the owner for his own accommodation." *Bond* v. *Evansville, etc., R. R. Co.*, 100 Ind. 301.

For a much greater reason would it be unjust to compel a railroad company to pay for animals which the owner voluntarily and habitually turned into its right of way, through a gate maintained for his accommodation.

The judgment is reversed, with costs.

Filed Oct. 12, 1887.

112 122
171 722

No. 13,674.

BLACK ET AL. *v.* CAMPBELL ET AL.

FREE GRAVEL ROAD.—*Petition.—Addition and Withdrawal of Names.—Board of Commissioners.—Estoppel.*—In a proceeding for the establishment of a free gravel road, the question as to whether the petition has been signed by the prescribed majority of land-owners remains an open one until the board of commissioners proceeds to consider and act upon the report of the viewers, which has been submitted, and until that time the names of persons may be added to the petition at their pleasure, and the names of persons who have signed it may be withdrawn therefrom by leave of the board, which ought not to be refused on reasonable terms, except for good cause shown, in the nature of an estoppel.

SAME.—*Withdrawal of Names Must be Made Before Petition is Finally Passed Upon.*—In such a proceeding the withdrawal of names from the petition after it has been filed is a dismissal of the proceeding as to them, and such withdrawal must be made before a decision is announced upon the merits of the petition.

SAME.—*Appeal to Circuit Court.—De Novo Proceeding.—Waiver.*—Upon an appeal to the circuit court from an order of the board of commissioners establishing a free gravel road, the appellants, whose motion before the board for leave to withdraw their names from the petition was overruled, may treat such motion as pending in the circuit court, or may, at their option, enter a similar motion *de novo* in that court, and the right to enter such motion on appeal is not waived by a prior motion made in the higher court to dismiss the proceedings on account of a lapse of jurisdiction over the subject-matter.

From the Carroll Circuit Court.

J. Applegate and *C. R. Pollard*, for appellants.

L. D. Boyd, for appellees.

NIBLACK, J.—This was an application to the board of commissioners of the county of Carroll for the location and construction of a free gravel road in that county, under the provisions of the act of March 3d, 1877, R. S. 1881, section 5091, *et seq.* The petition was signed by Samuel W. Black and a large number of other resident freeholders of the county, claiming to be a majority of land-owners interested

in, and to represent a majority of the acres of land which would be benefited by, the proposed improvement.

The application was made at the June term, 1884, at which viewers and an engineer were appointed and ordered to meet and proceed to the discharge of their duties on the 6th day of the ensuing month of October. At the next regular session in September, 1884, no order of continuance, or other order of any kind in the cause, was made; but at a special session held in that month, it was ordered that the time for the meeting of the viewers and engineer should be postponed until the 6th day of the succeeding November. On that day the viewers and engineer met, and, after qualifying, proceeded to make an examination of the proposed line of road. On the 9th day of the following December they made a report favorable to the prayer of the petitioners. Francis Thomson and others thereupon remonstrated against the construction of the road, and the matter was continued until the March term, 1885, during which the report was confirmed and the necessary order made to carry its recommendations into effect.

After the report of the viewers and engineer was filed, but before it was acted on by the board of commissioners, Albert Campbell and about twenty others, who had signed the petition, filed a written motion asking to have their names struck off and withdrawn from the petition for the alleged reason that the petition had been changed in a material respect after they had signed it, offering at the same time to pay their proportion of the costs which had already accrued, but their motion was overruled, and their names were taken into account by the board in estimating the number of persons who had signed the petition. Emma Campbell and perhaps nine or ten others, who had signed the petition, in like manner and for a similar reason asked to have their names struck off and withdrawn from the petition, but their motion was also overruled, and their names were likewise counted at the hearing of the report as persons who had signed the petition.

The remonstrants, including Thomson, appealed to the circuit court, where they moved to dismiss the petition upon the ground that, by reason of the failure of the board of commissioners to make any order in the cause at its September term, 1884, as stated, the jurisdiction of that tribunal over the subject-matter of the proceeding had lapsed, and that hence the circuit court had no jurisdiction to hear and determine the controversy sought to be continued by the appeal. That motion was sustained, and the judgment of dismissal which ensued was reversed by this court. See *Black* v. *Thomson*, 107 Ind. 162.

After the cause was remanded to the circuit court, Albert Campbell and those who had joined with him, and Emma Campbell and those who had united with her, respectively renewed their motions for leave to have their names struck off and withdrawn from the petition, and, as preliminary to the decision of those motions, it was agreed that if the motions should be sustained the remaining names would not constitute a majority of the resident land-owners of the county whose lands were to be benefited and assessed, and would not be the owners of a majority of the whole number of acres of land to be so benefited and assessed; but if the motions should be overruled, and the names of the dissatisfied persons should be counted, there would be found to be the requisite majority of names to the petition, and hence enough to authorize the court to order the construction of the contemplated road in accordance with the provisions of section 5095, R. S. 1881.

Upon this agreed statement of facts, and upon a full consideration of the matters before it, the circuit court sustained the motions and permitted the names indicated to be struck off and withdrawn from the petition, and refused to order the construction of the road, as prayed for by the remaining petitioners.

A reversal of these proceedings is sought upon the claim that, under the circumstances, the circuit court had no power

to allow a part of the petitioners to withdraw their names, as it assumed to do, and that if it had the power its exercise, in the manner and at the time stated, was against right and justice, and consequently erroneous.

The petition of five land-holders whose lands will be assessed is sufficient to confer upon the board of commissioners jurisdiction over the preliminary proceedings looking to the establishment and construction of a free gravel or turnpike road. R. S. 1881, section 5092.

The petition of that number of interested land-holders authorizes the appointment of viewers and a surveyor or engineer, an examination and survey of the proposed line of road, and a report upon the expediency and public utility of the enterprise. R. S. 1881, sections 5093, 5094.

It is not until after the viewers and surveyor or engineer have reported that the crucial and jurisdictional test arises as to whether the requisite majority have signed a petition praying that the improvement in question may be made.

Section 5095 confers upon the board authority, after the report has been submitted, to order the improvement to be made if, in its opinion, the work will be of public utility, but provides that "such order shall not be made until a majority of the resident land-holders of the county, whose lands are reported as benefited and ought to be assessed, and, also, the owners of a majority of the whole number of acres of all lands that are reported as benefited and ought to be assessed, shall have subscribed the petition mentioned" in section 5092, above cited.

We construe this provision, when taken in connection with the context, to mean that the question as to whether the prescribed majority of land-holders have signed the petition for the improvement remains an open question until the board proceeds to consider and to act upon the report which has been submitted to it, and that until that time the names of persons may be added to the petition at their pleasure, and the names of persons who have signed it may be withdrawn

by leave of the board, which ought not to be refused on reasonable terms, except for good cause shown, in the nature of an estoppel. *Hord* v. *Elliott*, 33 Ind. 220.

It is not authoritatively known what lands will be benefited and ought to be assessed until the report of the viewers and surveyor or engineer has been submitted, and hence it can not be with certainty determined who are, and who are not, competent petitioners until after the report has been made; hence the petition ought to remain open to amendment and to readjustment until the time arrives for an ultimate decision upon its sufficiency to authorize the confirmation of the report.

In a case like this, the withdrawal of a part of the names attached to a petition, after it has been filed, is simply a dismissal of the proceeding as to them, and, therefore, such withdrawal must be made before a decision is announced upon the merits of the petition. R. S. 1881, section 333.

In special proceedings of the class to which this belongs, the rules of civil practice prevail, except when it is otherwise provided, or when they are plainly inapplicable. *Hedrick* v. *Hedrick*, 55 Ind. 78; *Goodwin* v. *Smith*, 72 Ind. 113; *Stoddard* v. *Johnson*, 75 Ind. 20; *Stockwell* v. *Brant*, 97 Ind. 474; *Crume* v. *Wilson*, 104 Ind. 583; *Robertson* v. *State, ex rel.*, 109 Ind. 79.

If the dissatisfied petitioners had not moved for leave to strike off and withdraw their names before the board ruled upon the sufficiency of the petition, their right to so move would have been waived; but their motions having been entered in time, and the proceedings upon, and subsequent to, their entry having been suspended by the appeal, the movers were entitled to treat the motions as pending motions in the circuit court, or to enter similar motions *de novo* in that court, at their option; and when the cause was remanded from this court, it stood in that respect in the circuit court just as it did when it first reached that court by the appeal from the board. The proceedings being *de novo*

in the circuit court, a bill of exceptions signed by the board of commissioners would have perpetuated nothing, nor have brought up anything for review which occurred before the board. *Black* v. *Thomson, supra.*

But it is contended that as the dissatisfied petitioners permitted the remonstrants in the first instance to move in the circuit court to dismiss the petition, for the alleged lapse of jurisdiction in the board of commissioners, and allowed the cause to be then disposed of upon that motion, their right to thereafter press their motions to have their names struck off and withdrawn was thereby waived, and that, in consequence, they could not be renewed after the cause was remanded from this court.

The motion of the remonstrants raised the question of the jurisdiction of the court over the subject-matter of the action, and that gave it precedence over a motion to withdraw names from the petition, or any other motion which impliedly affirmed the jurisdiction of the court. Besides, there was no inconsistency or antagonism between the two motions. There was, therefore, no waiver of any right on the part of those who desired to have their names withdrawn, and there was nothing involved in the former appeal which in any way affected, much less concluded, that right. The proceedings now complained of were entirely subsequent to those first appealed from, and raise very different questions, both of practice and of legal construction, which are open to review at the present hearing. Buskirk Practice, 371; *Dodge* v. *Gaylord*, 53 Ind. 365; *Test* v. *Lareh*, 76 Ind. 452; *Gerber* v. *Friday*, 87 Ind. 366; *Jones* v. *Castor*, 96 Ind. 307.

The conclusion reached in this case, as to the time and the circumstances under which names may be withdrawn from the petition, is not in conflict with either the case of *Forsythe* v. *Kreuter*, 100 Ind. 27, or that of *Crume* v. *Wilson*, 104 Ind. 583, above cited. The first of these was a highway case, and the latter was a case for drainage. In both of these cases notice of the presentation of the petition was

required, and the sufficiency of the petition as a jurisdictional question had to be considered and ruled upon before appointing viewers in one case, and before referring the subject-matter of the petition to the drainage commissioners in the other. In this case notice was neither given nor required until after the viewers and an engineer were appointed and the time for their meeting was fixed, and for the reasons given no question arose as to the ultimate sufficiency of the petition until after the report of the viewers and engineer had been made. Up to that time all the proceedings were merely preliminary to the ultimate sufficiency of the petition as stated. See section 5092, R. S. 1881, *supra*.

The judgment is affirmed, with costs.

Filed Oct. 15, 1887.

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126	91
112	126
132	91

No. 12,785.

The Bloomfield Railroad Company v. Grace.

Railroad.—*Wrongful Appropriation of Land.—Agreement of Parties.—Damages.—Complaint.—Practice.*—In an action against a railroad company for the wrongful appropriation of land, an agreement by the parties thereto, made in open court, fixing the amount of damages which the plaintiff is entitled to recover, if he has a cause of action, will be enforced; and in such case, if some part of the cause of action averred is good and unanswered, the plaintiff is entitled to recover the stipulated damages.

Same.—*Pleading.—Defence.—Adoption by Railroad Company of Acts of Contractor or Receiver.*—Where, in such a proceeding, the complaint shows a wrongful appropriation of the plaintiff's land, an answer that the appropriation was made by a contractor of the railroad company, or by the receiver of such contractor, is bad on demurrer. If the railroad company adopts the acts of its contractor and the receiver, in appropriating the land, it must pay a just compensation.

SAME.—*Defence.—Answer.—Former Adjudication.*—In such an action, an answer which attempts to set up the defence of former adjudication, by averments that in a former suit against an insolvent construction company, concerning funds in the hands of the officers of the court, or which might come into their hands, upon which parties other than the plaintiff had claims, the plaintiff might have litigated his claim, but which does not show that he had notice of the pendency of such proceeding, or was a party thereto, is insufficient.

From the Greene Circuit Court.

J. T. Hays, H. J. Hays and *J. S. Cooper*, for appellant.

E. E. Rose and *E. Short*, for appellee.

ELLIOTT, J.—The parties by an agreement in open court fixed the amount of damages which the plaintiff was entitled to recover at four hundred dollars, and agreed that in the event that he should recover, and that sum was paid him, he should convey the land in controversy to the defendant, here the appellant. It was further stipulated that the agreement should "not prejudice the defendant's exceptions to the ruling on the demurrer to the answer." This agreement unquestionably submitted to the trial court but the one question, that of the appellee's right to recover damages, and reserved to the appellant only the questions presented by the demurrer to the answer. Where parties solemnly make such an agreement in open court it will be enforced. *Bloomfield R. R. Co.* v. *Van Slike*, 107 Ind, 480.

The only questions, therefore, which are presented to us are such as arise on the demurrer to the answer. It is, of course, essential to ascertain the cause of action stated in the complaint in order to pass upon the sufficiency of the answer, but this examination can properly go no further than to ascertain that the complaint states facts entitling the plaintiff to some damages. That it does do this is quite clear, for it shows a wrongful entry on the plaintiff's land and a negligent construction of a railroad over it. *Bloomfield R. R. Co.* v. *Van Slike, supra.*

The complaint shows a wrongful appropriation of the plaintiff's land, and it was no answer to this claim to aver that the appropriation was made by a contractor of the appellant or by the receiver of such contractor. If the appellant adopted the acts of its contractor and the receiver in appropriating the land it must pay a just compensation. In the case of *Lake Erie, etc., R. W. Co.* v. *Griffin*, 92 Ind. 487, it was held that a new company which succeeds to the rights of an old one must pay for the land appropriated by its predecessor. It was there said: "In such case, the appellant's liability does not rest upon the judgment against the old corporation, but upon the principle that, having adopted and ratified the original appropriation, it is bound in equity and good conscience to make compensation." This doctrine was reaffirmed in *Lake Erie, etc., R. W. Co.* v. *Griffin*, 107 Ind. 464, and in *Bloomfield R. R. Co.* v. *Van Slike, supra*. This doctrine is strictly equitable, and it is the only one logically defensible, for, if the contractor acquired no rights as against the land-owner, neither did the receiver nor one claiming through him.

The act of a contractor in appropriating real estate and devoting it to the purpose of constructing a railroad can not be considered the act of an independent contractor, for the corporation alone has the power to appropriate the private property to its use. In attempting to appropriate the land the contractor can not be considered as simply engaged in the work of constructing the road; he really acts for and as the corporation. *Bloomfield R. R. Co.* v. *Van Slike, supra*. Doubtless, the corporation would not be bound if he transcended his authority, unless it adopted or ratified his act; but where, as here, it does adopt his act, by receiving and enjoying its fruits, it is undoubtedly bound.

The answer can not, therefore, be sustained on the ground that the appropriation and entry were the acts of an independent contractor; nor can it be sustained on the ground

that the appropriation was made by a predecessor of the appellant.

So far as the answers attempt to set up a defence of former adjudication they fail, because, among other reasons, they do not show that the claim of the land-owner was embraced in the suit in which the notice to appear and present claims was issued. That suit was against an insolvent construction company, and concerned funds in the hands of the officers of the court, or which might come into their hands; for the order, among other things, declares that "It is further ordered, adjudged and decreed that all parties in interest having claims against any fund or funds involved in this case and subject to the order and distribution of this court, or which shall hereafter become subject to the order and distribution of the court pending this litigation," shall present them. This leads to the inference that the litigation concerned only a fund or funds upon which parties had claims, and there is nothing in the answers which shows that the plaintiff had any claim on any fund. At all events, it does not appear that the right of the appellee to recover for injury to his land could have been litigated. He was not a party to the litigation, for he made no claim upon any specific fund, and no process was served upon him. He could not, therefore, be bound by the judgment. The only notice given was a general one for all who had claims to present them—there were no writs issued—and this notice was, of course, no broader than the order on which it was founded; and as that order was addressed to claimants of an interest in a fund which was, or would be, in the hands of the court for distribution, it did not embrace a land-owner who had a general right of action for an invasion of his rights of property. *Bloomfield R. R. Co.* v. *Van Slike, supra.*

Under the allegations of the answers the receiver, while nominally that of the construction company, became, in a restricted sense, the representative of the appellant, and for

many purposes may be in strictness regarded as its representative.

The construction company had no authority to maintain and own a railroad; that right and power resided in the appellant. It alone could exercise the franchises of a railroad corporation, and it could not delegate the right to exercise the power of eminent domain to any other corporation, nor could it contract with another corporation that it should seize land without due process of law for railroad purposes. The claim of the appellee was in no sense against the construction company, but was against the corporation for whose use his land was taken and to which it was devoted. It could not, therefore, have been deemed a claim against the receiver, and was not involved in any decree pronounced in the matter of the receivership. It was and is a claim against the corporation for whose benefit the land was seized and for whose use it was retained.

There is no estoppel *in pais* where the land-owner makes no grants, executes no license and makes no representations. The fact that he knows that his land has been seized does not of itself estop him, for his silence is neither fraudulent nor culpable. He is chargeable with no wrong and there can be no equitable estoppel. There is neither false statement nor fraudulent concealment, nor is there deceit in any form. In such a case the land-owner is not estopped to assert his right to damages, although it is possible that long acquiescence might preclude him from recovering possession of the land itself.

It may be that as to some part of the cause of action stated in the complaint the fact that the wrongful acts were done by an independent contractor would bar a recovery, but the answer is not confined to any particular part of the complaint, and, as it fails to answer the whole complaint, it was properly held bad. The agreement fixes the measure of recovery, and nothing remained for the court to do but decide that some part of the cause of action was good and

unanswered, for, when this was ascertained, its only remaining duty was to adjudge the answers bad and award the stipulated damages. We are not, therefore, required, nor, indeed, authorized, to inquire whether the damages were excessive. Nor are we required to decide whether the complaint entitled the plaintiff to all the relief demanded, since it is well settled that if the complaint entitles the plaintiff to some relief it must be sustained. *Bayless* v. *Glenn*, 72 Ind 5.

Judgment affirmed.

Filed Oct. 19, 1887.

No. 12,910.

The Town of Gosport v. Evans.

Municipal Corporation.—*Town.—Streets and Sidewalks.—Defects and Obstructions in.—Liability for.*—A municipal corporation is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for travel by night as well as by day; but, that a pavement has become uneven, or that bricks therein may be displaced by the action of the elements, does not necessarily involve such municipality in liability if the defect can be readily discovered and easily avoided by persons exercising due care, or if the defect be of such a nature as not of itself to be dangerous to persons so using the walk.

Same.—*Contributory Negligence.*—One who sees an obstruction in a street or sidewalk, and, knowing its dangerous character, deliberately goes into or upon it when he is under no compulsion to do so, or might avoid it by going around, takes the risk upon himself, and if injured on account of such obstruction can not, because of contributory negligence, maintain an action therefor.

From the Owen Circuit Court.

G. W. Grubbs, J. C. Robinson and *I. H. Fowler*, for appellant.

D. E. Beem, W. Hickam, J. R. Fritts and *R. W. Miers*, for appellee.

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119 506
113 53
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MITCHELL, J.—The town of Gosport prosecutes this appeal from a judgment rendered by the Owen Circuit Court in favor of Lydia E. Evans against the appellant for one thousand dollars, that being the amount awarded the plaintiff by a jury in an action for damages for injuries sustained from a fall upon an alleged defective and dangerous sidewalk.

The argument for a reversal of the judgment is predicated mainly upon two propositions. It is contended:

1. That there was no evidence which tended to show such a defect in the sidewalk at the place where the plaintiff fell as rendered the town liable to the imputation of actionable negligence.

2. That there was no evidence tending to show that the plaintiff was in the exercise of due care at the time she sustained the injury.

Concerning the first point, it is only necessary to say the evidence does not make it entirely clear that the town was guilty of such negligence in respect to the sidewalk in question, considering its condition at the time of the injury complained of, as would have sustained a recovery even if the plaintiff had been without fault.

While a municipal corporation is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, by night as well as by day, it is by no means an insurer against accidents, nor can it be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to mere convenient travel. A contrary rule would, or might, burden municipal corporations beyond endurance. That a pavement may have become uneven from use, or that bricks therein may have become loose or displaced by the action of the elements, so that persons are liable to stumble, or be otherwise inconvenienced in passing, does not necessarily involve the municipality in liability so long as the defect can be readily discovered and easily avoided by persons exercis-

ing due care, or provided the defect be of such a nature as not of itself to be dangerous to persons so using the walk. *City of Indianapolis* v. *Cook*, 99 Ind. 10; *City of Quincy* v. *Barker*, 81 Ill. 300; *City of Richmond* v. *Courtney*, 32 Gratt. 792; *City of Chicago* v. *Bixby*, 84 Ill. 82; *City of Aurora* v. *Pulfer*, 56 Ill. 270.

Adapting the language of the court in *Hubbard* v. *City of Concord*, 35 N. H. 52 (69 Am. Dec. 520), to the case in hand, towns are not required to make their sidewalks perfect or to correspond with any given standard. In each case the sidewalk is to be pronounced sufficient or insufficient, according as it is, or is not, reasonably safe and convenient for the travel passing upon it, under the particular circumstances which exist in connection with that particular case.

Accepting as true the evidence most favorable to the plaintiff below, and it appears that some of the bricks in a pavement had been displaced and removed, leaving a depression of from two and a half to six inches in depth, covering an area of about three by four feet in the surface of the walk. The authorities had notice of the condition of the walk, and had directed the owner of the abutting lot to repair the pavement. At the time of the injury complained of all the streets and sidewalks in the town were covered with snow, sleet and ice, rendering them difficult and dangerous for foot travellers to pass over. The depression above described had become partially, and some of the witnesses say completely, filled with frozen snow, sleet and ice, presenting a surface not substantially different from that around it, except that it was perhaps somewhat lower.

There was evidence tending to show that some of the bricks which had become loose and displaced were frozen fast in the snow and ice in and about the depression in the pavement, and that some of these projected some inches above the icy surface. The plaintiff, who was well acquainted with the defect in the walk, and who had it in mind at the time, while passing over the place in the night-time, struck

her foot against one of the projecting bricks, which caused her to fall upon the icy pavement.

Since, therefore, it does not appear that the defective condition of the sidewalk occasioned an accumulation of snow and ice at that point, or made the surface of the walk substantially different there from what it was elsewhere, we are not prepared to say that, as respects its condition when the injury complained of was suffered, the town was remiss in its duty for not having removed the projecting brick which caused the plaintiff to fall. The fall was not occasioned by the plaintiff stepping in a hole, or slipping on ice accumulated therein, but by striking her foot against a brick which projected above the surface of the icy walk. If we should assume, however, that the walk was defective and dangerous at the time of the injury, and that the town neglected its duty in not repairing it, principles too firmly established to be departed from require that the judgment should be reversed, nevertheless.

The plaintiff was guilty of contributory negligence, and it is too well settled to require reference to authority, that contributory negligence prevents a recovery in an action like this.

It is disclosed in the evidence given on the stand by the plaintiff herself that she was returning home from church after the evening service in company with and by the side of another lady. She had passed over the sidewalk in question frequently. Quoting her own language, as we find it repeated again and again in the record of her testimony, she said: "I knew it was a bad place, but thought I could pass it; had passed it before; * * * I put on old shoes, and socks over them; I put them on that night to go through this place safely, and for all other bad places; * * * I knew it was a bad place, but thought I had prepared for it; knew just where it was; I could tell it as well after night as in daytime; * * * I could see the place when I came up; knew it was a bad and dangerous place, but thought I could

get through safe; I stepped carefully, but stumbled and fell; * * * nothing to prevent me from walking next to the fence, except that Mrs. O'Maris was walking there; don't know why I did not let go her arm and walk there; * * * had passed there often going to and from church."

Thus it appears that a person of mature years, and in the possession of all her faculties, deliberately walked into a place which, upon her hypothesis of the case, was one of known danger, and which she could have avoided by simply disengaging herself from and following in the footsteps of her friend.

The statement of Lord ELLENBOROUGH in *Butterfield* v. *Forrester*, 11 East, 60, that "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right," was hardly less applicable to the case in which it was made than to the one under consideration. "Two things must concur," said that learned judge, "to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

This rule, stated in different language, has been consistently and uniformly declared and adhered to by appellate courts in every common law jurisdiction. Beach Contrib. Neg., sections 7, 77; *Bruker* v. *Town of Covington*, 69 Ind. 33 (35 Am. R. 202); *President, etc.*, v. *Dusouchett*, 2 Ind. 586 (54 Am. Dec. 467); *Rieet* v. *City of Goshen*, 42 Ind. 339; *Jonesboro, etc., Turnpike Co.* v. *Baldwin*, 57 Ind. 86.

One who knows of a dangerous obstruction in a street or sidewalk, and yet attempts to pass it when, on account of darkness or other hindering causes, he can not see so as to avoid it, takes the risk upon himself. For a much greater reason does he take the risk upon himself, if, seeing an obstruction, and knowing its dangerous character, he deliberately goes into or upon it, when he was under no compulsion to go, or might have avoided it by going around. *Thomp-*

son v. *Cincinnati, etc., R. R. Co.*, 54 Ind. 197; *Louisville, etc., R. R. Co.* v. *Schmidt*, 81 Ind. 264; *King* v. *Thompson*, 87 Pa. St. 365 (30 Am. R. 364); *Toledo, etc., R. W. Co.* v. *Brannagan*, 75 Ind. 490; *City of Erie* v. *Magill*, 101 Pa. St. 616 (47 Am. R. 739); *Wilson* v. *City of Charlestown*, 8 Allen, 137; *Durkin* v. *City of Troy*, 61 Barb. 437; *City of Centralia* v. *Krouse*, 64 Ill. 19.

We do not question the doctrine of the cases which hold that because one has knowledge that a highway or sidewalk is out of repair, or even dangerous, he is not therefore bound to forego travel upon such highway or sidewalk. *City of Huntington* v. *Breen*, 77 Ind. 29; *Wilson* v. *Trafalgar, etc., G. R. Co.*, 83 Ind. 326; *Wilson* v. *Trafalgar, etc., G. R. Co.*, 93 Ind. 287; *Nave* v. *Flack*, 90 Ind. 205 (46 Am. R. 205); *City of South Bend* v. *Hardy*, 98 Ind. 577 (49 Am. R. 792); *Town of Albion* v. *Hetrick*, 90 Ind. 545 (46 Am. R. 230) *Turner* v. *Buchanan*, 82 Ind. 147 (42 Am. R. 485).

The doctrine to be extracted from these cases is, that although a sidewalk or highway may be in an apparently defective or dangerous condition, yet a person with knowledge of the defect or danger is not on that account obliged to abandon travel upon the highway, if, by the exercise of care proportioned to the known danger, he may reasonably expect to shun or avoid the defect. If the defect be one which does not render the way wholly impassable, and which can only result injuriously to the traveller if not shunned, if there be an apparently safe way of passage without going into the obvious defect, the traveller is not to be held to a rigorous account if he is deceived or misled, notwithstanding his effort to avoid the danger.

The authorities, however, lend no countenance to the notion that a person having knowledge of an obvious defect, or of a place in a highway which naturally suggests to a person of common understanding that it is dangerous, may, nevertheless, voluntarily cast himself into or upon the de-

fect, upon the theory that he is not obliged to forego travel upon the highway.

In *Horton* v. *Inhabitants of Ipswich*, 12 Cush. 488, the court said: "The real point is, not whether the plaintiff was chargeable with any negligence in making his way over the road, after he had entered upon it; but whether he knew, or had reason to believe, that the road was dangerous, when he entered on it, or before he reached any dangerous place. If so, he could not, in the exercise of ordinary prudence, proceed and take his chance, and if he should actually sustain damage, look to the town for indemnity." *Parkhill* v. *Town of Brighton*, 61 Iowa, 103.

"Where there is danger and the peril is known, whoever encounters it voluntarily and unnecessarily can not be regarded as exercising ordinary prudence, and therefore does so at his own risk." *Corlett* v. *City of Leavenworth*, 27 Kan. 673. *Schaefler* v. *City of Sandusky*, 33 Ohio St. 246 (31 Am. R. 533).

If the defect in the pavement, which the plaintiff voluntarily encountered, presented an obstruction, or was of such a character that the town of Gosport was bound to take notice of it, so that it was guilty of negligence in not repairing it, the conclusion follows necessarily that the plaintiff, having full and equal knowledge of its character, was guilty of contributory negligence in venturing upon it, no matter how carefully she may have prepared for the encounter, nor with how much care she went upon it. Her duty was to avoid the obstruction, or venture upon it at her own risk. *Durkin* v. *City of Troy*, *supra*.

These conclusions lead to a reversal of the judgment.

Judgment reversed, with costs.

Filed Oct. 13, 1887.

No. 13,888.

Behler v. The State.

Intoxicating Liquor. — *Affidavit for Continuance. — Admissibility in Evidence.—Admissions.*—An affidavit for a continuance containing admissions by the accused is admissible in evidence against him, but he may explain the statements therein by any competent evidence.

Same.—*Sale to Minor.—Good Faith of Seller.—Fabrication of Evidence.*—In a prosecution for selling intoxicating liquor to a minor, it is proper to prove facts tending to show that the defendant did not act in good faith, believing the buyer to be twenty-one years of age, and on this point the fabrication of evidence may be shown.

Same.—*Prosecuting Attorney.—Misconduct in Argument.*—Where the prosecuting attorney confines his argument to the issues and the evidence there is no misconduct, although there may be erroneous inferences.

From the DeKalb Circuit Court.

W. L. Penfield, for appellant.

L. T. Michener, Attorney General, *H. C. Peterson*, Prosecuting Attorney, *J. H. Gillett* and *C. E. Emanuel*, for the State.

Elliott, J.—The appellant prosecutes this appeal from a judgment declaring him guilty of the misdemeanor of selling liquor to a person under twenty-one years of age.

The evidence shows, without contradiction, that the person to whom the liquor was sold was not more than seventeen years old, and it also tends very strongly to show that the appellant had reason to believe, and did believe, that he was not of the age of twenty-one years.

On the trial the court permitted the prosecuting attorney to read in evidence an affidavit of the appellant filed on a motion for a continuance. We perceive no error in this ruling. The admissions in such an affidavit were made, it is to be presumed, with care and deliberation, and they were made under oath. Admissions so made are certainly as competent as oral admissions made to a clerk, a sheriff, or any other in-

dividual, and surely no one would doubt that an oral admission of a material fact would be admissible.

Statements in an affidavit for a continuance are not admitted, as counsel supposes, because they attack the general character of the accused, but because they tend to prove or disprove some material fact, or to contradict a witness introduced by the accused. In this case the statements tended to contradict the statements of the appellant when on the witness stand, as well as statements of his brother who testified in his behalf.

Affidavits for a continuance are entirely unlike affidavits for a change of venue, and counsel goes very far astray in asserting their similarity. Affidavits of the former class are required to state material evidentiary facts, and when they are stated they are affirmed by the affiant to be true. He thus admits, in a very solemn manner, their truth, and this admission may be used against him. In affidavits for a change of venue no evidentiary facts are stated, and they can not, therefore, supply evidence to be used on a trial.

The act of an accused in making a sworn statement of a fact or facts that he expects to prove by a witness, and in stating that he can prove such fact or facts by no other witness, is a purely voluntary act, deliberately performed and with ample time for reflection. It is no doubt true that an accused may show that he was mistaken as to some or all of the statements contained in his affidavit; and so, too, he has a right to explain them if he can by competent evidence, but the statements are nevertheless admissions, and, as such, entitled to go to the jury.

There is nothing giving to the statements in an affidavit for a continuance a privilege; nor is there anything which impresses upon them any compulsory or confidential features. The affidavit is a paper belonging to the files, public in its character, and freely executed.

It was a material question whether the appellant acted in good faith and in the reasonable belief that the person to

whom he sold the liquor was twenty-one years of age. The rule upon this point is thus stated by WORDEN, J., in *Goetz* v. *State*, 41 Ind. 162: "But the burthen of proof on this subject is on the defendant; and to make out this defence, such facts must be shown as will justify the inference of such *bona fide* belief." *Farbach* v. *State*, 24 Ind. 77; *Rineman* v. *State*, 24 Ind. 80; *Payne* v. *State*, 74 Ind. 203; *Mulreed* v. *State*, 107 Ind. 62. It was, therefore, proper to prove facts tending to show that the appellant did not act in good faith, and upon this point it was unquestionably competent to prove the fabrication of evidence. *White* v. *State*, 31 Ind. 262; *Sater* v. *State*, 56 Ind. 378; Lawson Presumptive Evidence, rule 115.

There was no such misconduct on the part of the prosecuting attorney in the argument as will warrant a reversal. It was proper for him to discuss the question of the appellant's good faith, and even if it were granted that he was mistaken as to the inferences he drew from the evidence, we could not reverse.

Where counsel confine their discussion to the issues and the evidence there is no misconduct, although there may be much bad logic and many erroneous inferences. *Proctor* v. *DeCamp*, 83 Ind. 559; *Heyl* v. *State*, 109 Ind. 589; *Boyle* v. *State*, 105 Ind. 469; Thornton Juries and Instructions, section 458. But we can not say that the inferences of the prosecuting attorney were erroneous; on the contrary, we strongly incline to agree with him in his reasoning.

Judgment affirmed.

Filed Oct. 14, 1887.

No. 12,959.

Stanley v. Stanley.

113 143
146 459
147 131

112 143
161 616

112 143
166 404

Guaranty.—*Notice.*—*Matter of Defence.*—If loss results to a guarantor on account of a failure to give notice of the non-performance of the contract guaranteed, the fact of loss and the failure to give notice constitute matters of defence.

Witness.—*Husband and Wife.*—*Confidential Communications.*—Testimony of a wife that her husband "was intoxicated" is not within the inhibition of section 497, R. S. 1881, which renders husband and wife incompetent to testify as to communications made to each other.

Same.—*Refreshing Recollection.*—*Testimony at Former Trial.*—To refresh the recollection of a witness, his attention may be called to his testimony, in relation to a particular subject, at a former hearing.

From the Madison Circuit Court.

C. L. Henry, H. C. Ryan and *E. P. Schlater*, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellee.

Mitchell, J.—This action was originally commenced in the name of William L. Montgomery, as trustee for Emma Stanley, against Jacob Stanley. It was a suit upon a bond executed by John and Jacob Stanley, conditioned that John Stanley should marry and provide for Emma Sutton, and maintain the child of which she was then pregnant, begotten of her body by John Stanley; and further, that he would furnish Emma Sutton, his intended wife, with a suitable home, and treat her as a husband should. The bond stipulated, among other things, that if John Stanley failed to perform the conditions thereof, or should by his misconduct give the obligee a legal cause for divorce, then, and in either event, the obligors therein should pay to the obligee, as stipulated and liquidated damages, the sum of fifteen hundred dollars. The bond was executed July 1st, 1882. John Stanley married the obligee, but, in all other respects, the complaint alleges, violated the conditions of the bond. He died in December, 1882. Montgomery, the trustee, brought

suit on the bond, and recovered judgment against Jacob Stanley for the stipulated damages. From that judgment an appeal was taken to this court. The judgment was reversed and the cause remanded. *Stanley* v. *Montgomery*, 102 Ind. 102.

After the case went back an amended complaint was filed, in which Emma Stanley was substituted as plaintiff in the place of Montgomery, trustee. In all other respects the amended complaint was substantially the same as that originally filed. The plaintiff below recovered judgment at the second trial.

The first question presented by the record arises upon the appellant's motion for judgment on the answers of the jury to special interrogatories, notwithstanding the general verdict. The answers show that no demand was made upon or notice given to the appellant, Jacob Stanley, before bringing suit. The latter, it is argued, occupied the relation of a guarantor, and hence was not liable to be sued without notice of the non-performance of the conditions of the bond, and a demand. This position is not sustainable. If it be conceded that the appellant occupied the position of a guarantor, it does not follow that there should have been either notice or a demand before bringing suit. If loss results to a guarantor on account of a failure to give notice of the non-performance of the contract guaranteed, the fact of loss, and the failure to give notice, constitute matters of defence. There was no issue involving any question of notice or demand. *Ward* v. *Wilson*, 100 Ind. 52; *Furst, etc., Mnfg. Co.* v. *Black*, 111 Ind. 308, and cases cited.

During the progress of the trial it became a question whether or not John Stanley was, after the execution of the bond, in the habit of becoming intoxicated, and whether he had not, while in that condition, presented himself at the place of his wife's residence. The appellee having been called as a witness in her own behalf, and referring to an occasion when

her husband visited her at her father's house, she was asked the following question: "You may tell the court what his condition was when he returned." The witness, over the appellant's objection, gave the following answer: "He was intoxicated." It is now contended that this testimony falls within the inhibition of section 497, R. S. 1881, which renders husband and wife incompetent to testify as to communications made to each other. The testimony is not controlled by the ruling in *Perry* v. *Randall*, 83 Ind. 143. The husband's condition, as to being intoxicated, unless it should appear to have been specially confided to the wife, in the absence of others, can not be regarded as in the nature of a confidential communication. Especially must this be so when the subject under investigation implies that the condition and conduct of the husband were an imposition upon the wife. *Smith* v. *Smith*, 77 Ind. 80; *Schmied* v. *Frank*, 86 Ind. 250. There was no error in admitting the testimony.

Complaint is made that the plaintiff, over objection, was permitted to call the attention of a witness in her behalf to what he, the witness, had testified, in relation to a particular subject, at a former hearing.

It is proper for a party, in order to refresh the recollection of his own witness, or to enable him to recollect the fact sought to be proved more clearly, to call his attention to any pertinent circumstance, or fact, having relation to the subject under inquiry. *O'Hagan* v. *Dillon*, 76 N. Y. 170.

Lastly, the appellant complains that certain instructions requested by him were not given by the court.

There is no objection made to the instructions given, except that, as it is claimed, they are incomplete and should have been supplemented by those asked by the appellant. It seems to us that the instructions given presented the case to the jury fully and fairly, and, in view of the evidence which appears in the record, it is difficult to conceive how

any other conclusion could have been reached than that arrived at by the jury, if the instructions asked had been given. We find no ground for a reversal.

The judgment is affirmed, with costs.

Filed Oct. 14, 1887.

112	146
117	157
119	40
112	146
130	427
113	146
141	505

No. 12,873.

KLEYLA v. THE STATE, EX REL. HOBBS.

BILL OF EXCEPTIONS.—*"Testimony" not Synonymous with "Evidence."—Practice.*—A statement in a bill of exceptions that "this was all the testimony given in the cause" does not show that it contains all the evidence given, and questions which are based upon the evidence will not be considered on appeal.

From the Tipton Circuit Court.

J. Jones, for appellant.

J. P. Kemp and *J. N. Waugh*, for appellee.

ELLIOTT, J.—The appellant assigns for error that the court erred in overruling his motion for a new trial. The motion states as reasons for a new trial:

"1st. The finding of the court is contrary to law.

"2d. The finding of the court is contrary to the evidence."

It is manifest that the questions sought to be presented can not be considered unless all the evidence can be regarded as in the record.

Appellee's counsel press the point that as it is stated in the bill of exceptions that "this was all the testimony given in the cause," and as there is no statement that "this was all the

evidence given in the cause," we can not consider the evidence as in the record. The authorities require us to yield to this contention. The word "testimony" is not synonymous with the word "evidence." *Harvey* v. *Smith*, 17 Ind. 272; *Brickley* v. *Weghorn*, 71 Ind. 497, and cases cited; *Sesenguth* v. *Posey*, 67 Ind. 408.

Judgment affirmed.

Filed Oct. 13, 1887.

No. 13,836.

Boyles *v.* The State, ex rel. Riggs.

Office and Officer.—*County Surveyor.*—*Term of Office.*—One elected to the office of county surveyor at the general election in November, 1884, who, in accordance with the provisions of his commission, took possession of such office on the 15th of the same month, and performed the duties thereof for the period of two years, can not continue to hold the same after his successor has been elected and qualified and makes demand therefor.

From the Pulaski Circuit Court.

H. A. Steis, *N. L. Agnew* and *B. Borders*, for appellant.

J. C. Nye and *R. A. Nye*, for appellee.

Niblack, J.—This was a proceeding in the name of the State, on the relation of Joseph Riggs, in the nature of a *quo warranto*, against John G. Boyles, to enable the relator to obtain possession of the office of county surveyor, together with the books, papers and other property pertaining thereto.

The circuit court tried the cause upon an agreed statement

of facts, the result being a finding and judgment in favor of the relator.

The statement of facts was to the effect that, at the general election held in the county of Pulaski on the second Tuesday in October, in the year 1880, one Jerome T. Bruce was elected surveyor of that county for the full term of two years, commencing during the succeeding month of November; that, on the 15th day of said month of November, a commission was duly issued and delivered to the said Bruce by the Governor, in which it was stated that the said Bruce should hold said office of surveyor for the term of two years from said 15th day of November, 1880; that Bruce thereupon qualified and entered upon the discharge of the duties of the office, and continued in the discharge thereof for the ensuing term of two years; that, at the general election held in said county of Pulaski on the 7th day of November, 1882, the defendant, Boyles, was elected to the said office of surveyor for the term of two years as Bruce's successor in that office; that, on the 15th day of November, 1882, a commission was likewise issued and delivered to Boyles, purporting to authorize him to hold the office to which he had been so elected for the term of two years from that date; that Boyles, after having qualified, entered upon the duties of the office, and continued in the discharge of the same during the succeeding two years; that, at the general election held in the same county on the 4th day of November, 1884, Boyles was again elected to the office of county surveyor as his own successor, and was, on the 15th day of that month, duly commissioned to hold said office for the term of two years from that day; that Boyles, after having qualified, entered anew upon the duties of the office, and has ever since continued and still continues to discharge the same; that, at the general election held in the county in question on the 2d day of November, 1886, the relator, Riggs, received a majority of all the votes cast at said election for the office of county surveyor, and was, in consequence, declared

duly elected to that office; that, soon thereafter, the Governor issued to him a commission which assumed to authorize him to hold that office for the term of two years from the 16th day of November, 1886; that Riggs thereupon qualified in due form of law, and, on the 17th day of said month of November, 1886, demanded the possession of said office, together with all the books, papers and other property pertaining to the same, to surrender which Boyles refused, and still continues to refuse, claiming that he is entitled to hold the office until the first Monday in November, 1887, under the combined operation of section 5948, R. S. 1881, and of the late constitutional amendment changing the time of holding our general elections.

The precise question involved in this appeal was presented in the case of *Pursel* v. *The State, ex rel.*, 111 Ind. 519, and was there decided adversely to the claim of Boyles. Adhering, as we do, to the conclusion there reached, the judgment in this case is affirmed, with costs.

Filed Oct. 18, 1887.

No. 13,711.

MOORE v. MOORE ET AL.

112	149
133	488
112	149
133	214
112	149
144	57

PROMISSORY NOTE.—*Endorsement.—Fraud.—Innocent Purchaser After Maturity.—Estoppel.*—Where the holder of a promissory note is induced, by fraud and without consideration, to endorse and deliver the same to another, who, after maturity, endorses it to an innocent purchaser for value and without notice, the latter takes title, the original holder being estopped as against him to deny the title of the fraudulent endorsee.

From the Clark Circuit Court.

J. B. Brown, for appellant.

W. K. Marshall, for appellees.

MITCHELL, J.—This was a suit by Robert W. Moore against William and Kate Lee to foreclose a mortgage executed by the latter as a security for the payment of five promissory notes, payable by the mortgagors to Louis Schneck, guardian of Charles H. Moore, a person of unsound mind.

As appears from the complaint, the notes were endorsed by Schneck to Mary A. Moore, and by her to James E. Moore, and by the latter to the plaintiff, Robert W. Moore.

The appellant, Mary A. Moore, upon her intervening petition, was admitted a party defendant. She thereupon filed a cross-complaint, in which she alleged that the endorsement and delivery of the notes by her had been procured by fraud and false representations, and by the inducement and persuasion of James E. Moore, to whom she endorsed them without any consideration, and that she was, therefore, in fact the owner of the notes in suit. She prayed that the mortgage might be foreclosed, and that the court give its decree perpetually enjoining the plaintiff from claiming any interest in the notes or in the decree of foreclosure.

Issue was taken upon the cross-complaint, the makers of the notes making no contest, and upon due request the court made a special finding of the facts.

So far as they are material to be stated, the facts found are that the notes and mortgage in suit had been assigned and delivered to Mary A. Moore by the guardian of her deceased husband, as part of her share in her husband's estate. It was also found that the appellant, Mary A. Moore, endorsed and delivered the notes and mortgage to James E. Moore without any consideration whatever, and that the endorsement and delivery had been obtained by the false and fraudulent representations of James E. Moore and one Amy Jones. On the 24th day of April, 1884, long after the notes had matured, they were endorsed and delivered, with the mortgage, by James E. Moore to the plaintiff, Robert W. Moore, who paid their full face value, without any notice that they had been obtained from Mary A. Moore by fraud and false rep-

resentations, or that she had or claimed any title or interest whatever in the notes and mortgage.

The court having found that Robert W. Moore was a purchaser for full value, without notice, the question is whether his title to the notes will prevail over the appellant's equity, notwithstanding the endorsement and delivery were obtained by the appellee's assignor from the appellant by fraud and without consideration.

The argument for a reversal rests mainly on the proposition that the assignee of a non-negotiable instrument can take no greater interest or better title to the instrument assigned than was possessed by the assignor at the time of the transfer; hence, the argument proceeds, the notes in suit having been transferred to the appellee after they had matured and were dishonored, the latter took them subject not only to all defences and equities between the original parties, but subject also to all equities in favor of the appellant, a prior endorser. In short, the appellee's position is that "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

This doctrine ruled the case of *Bush* v. *Lathrop*, 22 N. Y. 535, and some earlier cases in the State of New York. As applied to instruments or things in action, the legal title to which is transferable by assignment in writing, the doctrine relied upon has been distinctly and repeatedly repudiated by the more recent decisions in New York, as, also, in other jurisdictions. *McNeil* v. *Tenth Nat'l Bank*, 46 N. Y. 325; *Moore* v. *Metropolitan Nat'l Bank*, 55 N. Y. 41; *Trustees, etc.*, v. *Wheeler*, 61 N. Y. 88, 104; *Davis* v. *Bechstein*, 69 N. Y. 440; 2 Daniel Neg. Instr., section 1708*g*.

Section 5501, R. S. 1881, provides that "All promissory notes, bills of exchange, bonds, or other instruments in writing, signed by any person who promises to pay money, * * * shall be negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively."

The section following authorizes the assignee of any such

instrument, so endorsed, to recover in his own name from the person who made the same.

The effect of these provisions is to vest in the endorsees of the instruments named therein, whether such instruments be technically negotiable by the law merchant or not, a complete legal title, as well as a right of recovery by endorsees in their own names, respectively.

Whatever right remains in the assignor of an instrument thus assignable, after the holder has transferred it by an unrestricted endorsement, must of necessity be of a purely equitable character. It is not perceived, therefore, why an innocent purchaser, who takes such an instrument by endorsement for value, and without notice of the latent equities of prior endorsers, may not stand upon the rule that where the equities are equal he is in the situation of advantage who holds the legal title. If one of two equally innocent parties must suffer, that one who, by his endorsement of the instrument, has conferred upon another the apparently absolute ownership of the paper must bear the loss. This doctrine ruled the case of *Stoner* v. *Brown*, 18 Ind. 464, which is not distinguishable in principle from the case before us. It is familiar law that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good-faith purchaser. *Parrish* v. *Thurston*, 87 Ind. 437; *Curme, etc.*, v. *Rauh*, 100 Ind. 247; *Alexander* v. *Swackhamer*, 105 Ind. 81 (55 Am. R. 180); *Weaver* v. *Barden*, 49 N. Y. 286; 1 Benjamin Sales, section 450.

We are unable to discover any good reason for a distinction in that regard between chattels and such instruments as may be assigned by endorsement, so as to give the assignee a complete legal title.

The more modern rule upon the subject under consideration seems to be, that where the owner of things in action, although not technically negotiable, has clothed another, to

whom they are delivered in the method common to all mercantile communities, with the usual apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute. 2 Pomeroy Eq. Jur., section 710; Pomeroy Remedies, etc., section 161; *Combes* v. *Chandler*, 33 Ohio St. 178; *McNeil* v. *Tenth Nat'l Bank*, *supra*, and cases cited; *Burton's Appeal*, 93 Pa. St. 214; *Wood's Appeal*, 92 Pa. St. 379 (37 Am. R. 694).

The estoppel thus applied between assignors and assignees in no wise affects the right of the makers of such paper to set up any defences which the statute makes available to them. The purchaser of such paper can not affect the makers by an estoppel against any prior assignor as to any defences or equities between the original parties. *Davis* v. *Bechstein*, *supra*.

The authorities already cited cover every feature of the questions under consideration so fully that further discussion of the subject could add nothing to what has been there said.

The case of *Carithers* v. *Stuart*, 87 Ind. 424, although clearly distinguishable in its facts, recognizes the doctrine and authorities which control our judgment in this case; nor is our conclusion here in any manner opposed by the case of *Kastner* v. *Pibilinski*, 96 Ind. 229, and the authorities upon which that judgment rests.

There was no error. The judgment is affirmed, with costs.

Filed Oct. 18, 1887.

119 154
115 146
116 543
190 548
119 154
195 118
196 219
112 154
147 155
112 154
151 92

No. 12,838.

JOHNSON v. MURRAY, ADMINISTRATOR, ET AL.

SHERIFF'S SALE.—*Upon Writ Improvidently Issued.—Sale not Void.*—A sale of real estate under an alias writ is not void because the writ was improvidently issued, without an order from the judgment plaintiff.

SAME.—*Irregularity.—Not Available to Judgment Creditor to Defeat Consummated Sale.*—One who claims in the character of a judgment creditor can not avail himself of a mere irregularity to defeat a consummated sale.

QUIETING TITLE.—*Complaint.—Relief of Different Character.*—A complaint to quiet title to land, upon a specific claim of absolute ownership, does not entitle the plaintiff to relief of an entirely different character.

From the Grant Circuit Court.

G. W. Harvey and *C. E. Shipley*, for appellant.

I. Van Devanter and *R. T. St. John*, for appellees.

ELLIOTT, J.—The facts stated as the cause of action in the appellant's complaint are substantially these: The appellant and each of the appellees recovered judgments against John C. Harris and Noah Harris, on the 6th day of February, 1878. Executions were issued on these several judgments at the same time, were received by the sheriff at the same time, and were levied on the same land at the same time. There was no sale of the land levied on; the executions were returned by the sheriff, and immediately upon their return, alias writs were issued by the clerk upon returns made by the sheriff, until the number of writs reached five; on the fifth and last issue of the alias writs the land was sold. Each of the appellees, as judgment creditors, became purchasers, but paid no money on their respective bids, except the amount of the costs, the remainder being paid by crediting it upon the writs. The alias writs were issued without any order from the appellees. The appellant claims title and asks to have it quieted in him.

In the brief of appellant's counsel they say: "At least

two questions are presented," and, as we understand them, the first question is, were the sales void because the writs issued subsequent to the original executions were not ordered by the several judgment plaintiffs?

We shall, in accordance with the settled rule, confine our discussion to the questions stated by counsel, and shall consider those questions in the order adopted by them.

It is conceded by counsel that, prior to the enactment of the fee and salary bill of 1879, the issuing of a writ by the clerk without the order of the judgment plaintiff was an irregularity which would not invalidate the sale, and which might be waived. Undoubtedly this was the law. *Jones* v. *Carnahan*, 63 Ind. 229; *Richey* v. *Merritt*, 108 Ind. 347. But counsel assert: "All this has been changed by the enactment of the statute." The provision upon which they rely was originally found in the fee and salary bill, but is also now incorporated in the code. Acts of 1879, p. 137; R. S. 1881, section 678. The provision to which they refer reads thus: "No execution shall, in any case, be issued in any cause, except on the written precipe of a party to such suit, his representatives or assigns, or of his attorney of record." This provision is little more than a declaration of the common law rule, and under that rule it was uniformly held, as counsel admit, that the issue of an execution without the authority of the plaintiff did not render the sale void. There is no reason why it should do so under the statute. Neither by expression nor by implication does the Legislature declare that the breach of duty on the part of the officer shall vitiate the sale. There is nothing that indicates an intention to break away from the long settled rule that such an irregularity will not make the sale void. It would be putting much into the statute that is not there to hold that it was meant to change the rule that had so long existed. The statute does no more than prescribe the duties of the officer; it does not enact that a failure to perform it shall avoid the sale. It was the officer's duty under the common law, as

much as it is under the statute, not to issue an execution without the authority of the plaintiff, and there would be just as much reason for holding under that rule, as under the statute, that a failure of the officer to perform his duty made the writ void; and yet, without hesitation, it was always held that the writ was not void as against the execution plaintiff, or an innocent purchaser who bought at the sale made on such a writ.

The improvident issue of a writ does not render it void. *Richey* v. *Merritt, supra.* Freeman says: "A void writ is one which can have no force whatever, unless perhaps as a justification to an officer having no notice of its invalidity." Freeman Ex., section 73.

If the writ is not void it must be attacked directly, and not collaterally; at all events, it must be attacked prior to the acquisition of title by a sale made under it. *Richey* v. *Merritt, supra.* We think the irregularity in this instance is one falling within the general principle stated by Mr. Freeman in sections 339 and 340 of his work, and that it is not of such a character as to avoid the sale. It would, indeed, be an evil rule that would permit sales to be set aside after a long lapse of years because the clerk had issued *alias* writs without the direct authority of the judgment plaintiff, for such a rule would make titles insecure, destroy confidence in sheriff's sales, and injure the debtor, because it would make men unwilling to pay fair prices for property sold upon execution. The true and just rule is that recognized by the text-writers and by our decisions, and that is, where there is a mere improvident issue of the writ there must be a motion to quash it, or some such direct attack, and that a suit to quiet title after the sale has been perfected will be unavailing.

Another rule is decisively against the appellant, and that is this: One who claims in the character of a judgment creditor can not avail himself of a mere irregularity to defeat a consummated sale. It is, as a general rule, only the execution defendant who can avail himself of an irregularity, even

by a proceeding instituted before the sale is made. This is so decided in *Jones* v. *Carnahan*, *supra*, and the decision is well supported.

The second question which counsel say the record presents is, does the complaint entitle the appellant to any relief? But this is a mistaken view, for the question is, does the complaint entitle the appellant to have his title quieted?

Where a plaintiff seeks to quiet title to all the land in controversy upon a specific claim that he is the absolute owner of it, he can not succeed by showing that he is entitled to partition, or to some relief of an entirely different character. A complaint to quiet title, where the claim is to the whole interest in the land as absolute owner, can not be good as a complaint for partition. Where a party sues to quiet title he must show title in himself to the land he claims, and that the defendants have none, or at least not such as they assert. *Ragsdale* v. *Mitchell*, 97 Ind. 458. If the appellees have any interest in the land it can not be cut off by an action to quiet title, and, therefore, the appellant can not maintain the action, even though he may have some interest with the appellees in the land.

Judgment affirmed.

Filed Oct. 15, 1887.

112 158
119 403
113 594
115 48
121 568
112 158
131 238
112 158
135 569

No. 13,545.

RUSH ET AL. v. THOMPSON ET AL.

PARTNERSHIP.—*Set-Off.—Counter-Claim.*—To a complaint by three persons claiming to be partners, an answer by way of set-off and counter-claim that the defendant is not indebted to the firm as so constituted, but that his business dealings had been wholly with the firm composed of two of the plaintiffs only, who, as such partners, were indebted to the defendant in a sum exceeding that sued for, and offering to set off an equal sum against any amount found due said two plaintiffs and asking judgment against them for the balance, is good.

SAME.—*Representations by One Partner that Another is not Member of Firm.*—One partner, dealing in the name of the firm, can not deprive another member of the firm of his interest in the partnership assets by representations to others with whom he deals that such person is not a member of the firm, where the latter neither authorizes nor knows of such statements.

SAME.—*Set-Off.—Mutuality.*—Where a firm composed of three persons sues to recover a debt due to the firm as so constituted, the defendant can not set off a debt due from two of the partners to him against their proportion of the debt sued for.

SET-OFF.—*Mutuality.*—Mutuality is essential to the validity of a set-off, except where it is necessary to allow the set-off in order to prevent irremediable injustice.

SUPREME COURT.—*Pleading.—Harmless Error.*—Where a demurrer has been sustained to a good paragraph of answer, and there is no other paragraph under which the same facts are admissible in evidence, the Supreme Court can not, by looking to the evidence or to the finding of the trial court, pronounce the error harmless.

PRACTICE.—*Pleading.—Evidence.*—Proof of a cross complaint can not be made under an answer of general denial.

From the Marion Superior Court.

S. Claypool and *W. A. Ketcham*, for appellants.

J. S. Duncan, *C. W. Smith* and *J. R. Wilson*, for appellees.

ZOLLARS, C. J.—James W. Thompson, Sr., John W. French and James W. Thompson, Jr., appellees here, brought this action against Frederick P. Rush, George E. Townley and Edward F. Gall, the appellants.

Appellees alleged in their complaint that they were part-

ners doing business under the firm name of J. W. Thompson & Co., and that appellants, a firm doing business under the firm name of Fred P. Rush & Co., were indebted to them in the sum of $10,552 for wheat sold and delivered.

Appellants filed what purports to be an answer, in four paragraphs: First, a general denial; second, payment. In a third paragraph, as therein stated, by way of answer, and by way of set-off and counter-claim, appellants denied that they were, or at any time had been, indebted to the plaintiffs, or ever had any business transaction with them as such firm, composed of the three members named. It was further averred, that they had sold wheat for James W. Thompson, Sr., and John W. French, partners doing business under the firm name of J. W. Thompson & Co., and received the money for the same, and that, prior and subsequent to such sale, said James W. Thompson, Sr., and John W. French, under such firm name, became indebted to them, the defendants, in the sum of $55,292 for services rendered to said firm at their request, for money laid out and expended for them at their request, and for money had and received by them from the defendants. The plea closed with an offer to set off, as against any amount that might be found due to said James W. Thompson, Sr., and John W. French, an equal amount due from them to the defendants, and with a prayer for judgment against said plaintiffs for the balance due the defendants.

It is assigned as error here, that the court below erred in sustaining a demurrer to the foregoing plea. That assignment must be sustained. The plea is clearly good.

As a rule of pleading, it is settled in this State that a complaint by several persons must state a cause of action in favor of all of them in order to be good as against a demurrer for want of facts. *Berkshire* v. *Shultz*, 25 Ind. 523; *Holzman* v. *Hibben*, 100 Ind. 338.

On the other hand, it is provided by statute that, upon the trial of a cause, judgment may be given for or against one

or more of several plaintiffs, and for or against one or more of several defendants. R. S. 1881, sections 568, 569.

If, upon the trial, the evidence had shown that appellants were indebted to Thompson, Sr., and French, as the only members of the firm of J. W. Thompson & Co., the court would have had the right, under the above statute, and it would have been its duty, in the absence of countervailing evidence, to have rendered judgment against the defendants in favor of those plaintiffs. And because of that right and duty on the part of the trial court, it must follow that appellants, as defendants below, had the right to plead that Thompson, Sr., and French were the only members of the firm of J. W. Thompson & Co., and the only persons who had any interest in the cause of action set up in the complaint, or to whom they were in any way indebted, and also to set up, as against those plaintiffs, whatever defence they had, or whatever claim they had in the way of set-off or counter-claim. *Berkshire* v. *Shultz, supra; Hamilton* v. *Browning*, 94 Ind. 242; *Moyer* v. *Brand*, 102 Ind. 301; *Terwilliger* v. *Murphy*, 104 Ind. 32.

The fourth paragraph of plea by appellants, defendants below, like the third, purported to be by way of answer, and by way of set-off and counter-claim. The facts set up in the two paragraphs were substantially the same, with this difference: In the third it was alleged, as a fact, that the firm of J. W. Thompson & Co. was composed of Thompson, Sr., and French only. In the fourth it was alleged that, during the transactions between the parties, James W. Thompson, Sr., and John W. French *claimed* that they alone composed the firm of J. W. Thompson & Co. There were these averments: "And defendants say that they were never informed, nor had they notice, that the plaintiff James W. Thompson, Jr., was a member of, or had any interest in, or connection with said firm. And in all their transactions with said plaintiffs Thompson, Sr., and French, said plaintiffs represented that said firm was composed of the said

plaintiffs Thompson, Sr., and French, and that no other person whatever had any interest in said firm." It was further averred that, relying upon said representations, and believing them to be true, appellants rendered the services and advanced the money, etc., to said Thompson, Sr., and French. The paragraph closed with a prayer that as against any amount that might be found due to Thompson, Sr., and French, an equal amount due from them to appellants might be set off, and that appellants might have judgment against said plaintiffs for the balance due from them.

That plea, we think, was not good. That the three plaintiffs, appellees, composed the firm of J. W. Thompson & Co. is not disputed in the plea; nor is there any charge of bad faith on the part of Thompson, Jr., either in the way of representations, in the way of keeping silent when he ought to have spoken, or in any other manner. Nor is it charged, or in any way shown, that he was a dormant partner.

The only construction that can be put upon the plea is, that Thompson, Sr., and French represented to appellants that they alone composed the firm of J. W. Thompson & Co. There is no averment that Thompson, Jr., either authorized or had any knowledge at all of such representations by his partners. Thompson, Jr., although he did not personally participate in the transactions between appellants and the firm of J. W. Thompson & Co., being a partner in that firm, had an interest in all of the firm assets, including, of course, the wheat sold to appellants, or sold by them for the firm, and hence had an interest in the claim against appellants for the value of the wheat, or the amount received by them for it. He could not be deprived of that interest by the statements of his partners, without his knowledge or consent, that he was not a member of the firm. Each partner in a firm is, in a sense, the agent of his co-partners, and may bind them by his acts, contracts and statements as to all matters fairly within the scope of the partnership business; but, deal-

ing in the name of the firm, one partner can not deprive another member of the firm of his interest in the firm assets, by representations to others with whom he deals that such partner is not a member of the firm, where such partner neither authorizes nor knows of such statements. *Gordon* v. *Ellis*, 52 Eng. C. L. 821; 2 Lindley Partnership, pp. 508, 509; *Ramazotti* v. *Bowring*, 7 C. B. (N. S.) 851.

Mutuality is essential to the validity of a set-off. *Griffin* v. *Cox*, 30 Ind. 242; *Booe* v. *Watson*, 13 Ind. 387; *Blankenship* v. *Rogers*, 10 Ind. 333; *Proctor* v. *Cole*, 104 Ind. 373 (379).

No mutuality is shown here. The debt due from appellants was, and is, due to the firm of J. W. Thompson & Co., composed of James W. Thompson, Sr., John W. French and James W. Thompson, Jr. The debt due to appellants is due from Thompson, Sr., and French alone. It, therefore, can not be set off against the debt due to the plaintiffs, appellees, from appellants.

The prayer, however, is to be allowed to set off so much of the debt due from appellants as shall equal the amount that shall be found due to Thompson, Sr., and French. That can not be done. Thompson, Jr., can not be compelled to submit that he shall personally, or that his firm shall, be subjected to the delay and expense incident to a trial of the claims existing between two of his partners and appellants. And, besides, the debt due from appellants is a partnership asset, and Thompson, Jr., has a right to insist that it shall be preserved intact for partnership purposes, such as the payment of partnership debts, etc.

There are cases where want of mutuality will not defeat a set-off, as where it is necessary to allow the set-off in order to prevent irremediable injustice, but this is not such a case, for more than one reason. For that class of cases see *Cosgrove* v. *Cosby*, 86 Ind. 511; *Wulschner* v. *Sells*, 87 Ind. 71 (75); *Carter* v. *Compton*, 79 Ind. 37.

Our conclusion is, that in sustaining the demurrer to the

fourth plea the court ruled correctly, and that it erred in sustaining the demurrer to the third plea.

Appellees' counsel contend that, conceding that the court thus erred, the error should be treated as a harmless one, and the judgment be affirmed.

Their argument is, that the essential facts set up in the plea were admissible in evidence under the general denial; and that in finding for all of the plaintiffs the court determined and ruled that the firm of J. W. Thompson & Co. was composed of the three plaintiffs, and that thereby it is made apparent that the plea could have been of no avail to appellants had the demurrer been overruled.

It has been many times ruled by this court, that an error in sustaining a demurrer to a good paragraph of an answer will be treated by this court as a harmless error, if there is another paragraph under which the same facts are admissible in evidence. *Mason* v. *Mason*, 102 Ind. 38; *McGee* v. *Robbins*, 58 Ind. 463; *Johnson* v. *Putnam*, 95 Ind. 57; *Moore* v. *Boyd*, 95 Ind. 134; *Epperson* v. *Hostetter*, 95 Ind. 583; *Luntz* v. *Greve*, 102 Ind. 173; *Landwerlen* v. *Wheeler*, 106 Ind. 523.

It is also settled by the decisions of this court, that where a demurrer has been sustained to a good paragraph of answer, and there is no other paragraph under which the same facts were admissible in evidence, this court can not, by looking to the evidence, or to the finding of the court, pronounce the error harmless. *Wilson* v. *Town of Monticello*, 85 Ind. 10; *Moyer* v. *Brand*, 102 Ind. 301; *Fleetwood* v. *Brown*, 109 Ind. 567 (573).

We repeat here what was said in the last case: "The sustaining of a demurrer to a good paragraph of an answer, when there is no other paragraph under which the same facts may be proven, is, in effect, a decision by the court that the facts thus set up do not constitute a defence, and are not admissible in evidence. And although the record might show that some such facts as those specially pleaded were admitted in

evidence, this court has no way of knowing that other facts in support of the plea might not have been brought forward by way of evidence, had the court not ruled the plea insufficient as a defence." See, also, *Pennsylvania Co.* v. *Poor*, 103 Ind. 553; *Pennsylvania Co.* v. *Marion*, 104 Ind. 239.

In the case before us, unless there was another plea under which the facts set up in the third could and might have been proven, the ruling of the court upon the third was, in effect, a decision and notice to appellants that the facts therein pleaded were insufficient either as a defence or by way of set-off or counter-claim.

The evidence is not in the record, and if it were we could not look to it for the purpose of ascertaining whether or not appellants were injured by the ruling.

As said in the case of *Fleetwood* v. *Brown, supra*, we would have no way of knowing that other facts in support of the plea might not have been brought forward had the court not ruled the plea insufficient. Nor can we look to the finding and judgment of the trial court.

The court found in favor of all the plaintiffs, and thus ruled that the transactions on the part of appellants were with all of the plaintiffs, and not with the two as alleged in the plea; but had the plea been held good, appellants might have produced sufficient evidence to have convinced the court of the truth of the matters by them pleaded, and thus to have brought about a different result.

Counsel call our attention to section 398, R. S. 1881, which provides that judgments shall not be reversed on account of errors or defects in pleadings or proceedings, which do not affect the substantial rights of the adverse party. That section has been many times applied by this court, and will be applied in all proper cases. The difficulty here is, that this court can not say that the ruling of the court below upon the third plea did not affect appellants' substantial rights.

This is not a case like the cases of *Keegan* v. *Carpenter*, 47 Ind. 597, *State, for use of School Town, etc.*, v. *Julian*, 93

Ind. 292, *Souders* v. *Jeffries*, 98 Ind. 31, and *Smith* v. *McKean*, 99 Ind. 101, where the court, having refused to sustain a demurrer to pleadings, found for the demurring party upon the merits of the case.

Under the general denial a defendant may introduce in evidence whatever will meet and overthrow, or tend to overthrow, what the plaintiff is bound to establish in order to a recovery upon his complaint, and nothing more. *Leary* v. *Moran*, 106 Ind. 560; *Searcy* v. *State, ex rel., etc.*, 93 Ind. 556.

Under the general denial in this case appellants might have shown that there was no cause of action in favor of the three plaintiffs, but one in favor of two of them only. That would have defeated a recovery by all, but it would not have defeated a recovery by the two.

But in order to accomplish what appellants were seeking to do, it was necessary to go further, and establish their set-off. That they could not do under the general denial; that they could not do without an affirmative pleading, such as that struck down by the court.

Thus far we have spoken of the third and fourth paragraphs as pleas. In a strict legal sense they were not pleas, but more than that, cross complaints, setting up causes of action in favor of appellants against two of the plaintiffs. 1 Works Pr., section 640; *Blount* v. *Rick*, 107 Ind. 238 (245); *Kennedy* v. *Richardson*, 70 Ind. 524; *Boil* v. *Simms*, 60 Ind. 162; *Standley* v. *Northwestern M. L. Ins. Co.*, 95 Ind. 254.

There is no theory of practice which will admit proof of a cross complaint under an answer of general denial.

The judgment is reversed, at appellees' costs, and the cause remanded, with instructions to the court below to overrule the demurrer to appellants' third plea, or, more correctly, cross complaint.

Filed Oct. 20, 1887.

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No. 12,945.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO RAILWAY COMPANY v. LONG, ADMINISTRATOR.

NEGLIGENCE.—*Railroad.—Presumption that Men will Act Reasonably.—Extraordinary Conditions.*—Persons in control of railroad trains have a right to presume that men of experience will act reasonably in all given contingencies. They are not bound to anticipate and provide against extraordinary, unusual and improbable conditions, which involve inattention on the part of others, and their duty to persons thus situate only begins when they have good reason to suppose that they are unconsciously in peril or disabled from avoiding it.

SAME.—*Presumption that Men will Leave Track.*—A watchman or lookout on a train, moving slowly, with bell ringing, may presume, when he sees a man walking soberly on or near the track, that the latter has observed the train, if by the exercise of care he could have observed it, and, unless something indicates the contrary, that he will step aside so as to avoid injury.

SAME.—*Tracks Used by Several Railroads.—Liability to Servants of Other Companies.*—The employees of a railroad company, whose track connects with union tracks belonging to a distinct corporation, which are used for switching and other local purposes by the several railroads centering in the city where they are laid, may assume that the servants of other companies, who are discharging duties upon the tracks and grounds of the union company, will observe a degree of care commensurate with the known perils of the situation and the duties required of them.

SAME.—*Switchman.—Injury While Discharging Duty.—Care Required of.*—A railroad company using one of the union tracks is not liable for an injury to a switchman employed by another company, sustained by being struck by a slowly backing train, with bell ringing, while walking upon or near such track to reach a switch standard to be operated by him, where, by the exercise of the same degree of vigilance for his own safety as would be required of a traveller or other person rightfully at the same place, he could have avoided the injury.

SAME.—*Backing Train.—City Ordinance Requiring Watchman on.—Failure to Give Warning.*—A city ordinance, requiring a watchman to be stationed on the rear end of trains running backward through the city, in order to avoid accidents, does not require the watchman to stop the train or sound a warning when he has reason to believe that the person in the way of the train can and does see it approaching, and is in a situation to avoid danger by the exercise of his own volition; and the failure of

the watchman to so act under such circumstances does not charge the company with negligence.

SAME—*Absorbing Duty.—Contributory Negligence.*—In the absence of any special circumstances, an experienced switchman, who is proceeding with his customary duties between two tracks, where the observance of care will enable him to perform such duties in safety, can not be said to be so absorbed in his duty as to exempt him from the necessity of exercising care for his own safety, and his failure to do so constitutes contributory negligence.

From the Marion Superior Court.

A. W. Hendricks, O. B. Hord, A. Baker and *E. Daniels*, for appellant.

H. N. Spaan and *A. W. Wishard*, for appellee.

MITCHELL, J.—Long, as administrator of the estate of Charles Hampton, deceased, sued the appellant railway company to recover damages for wrongfully and negligently causing the death of the decedent.

The paragraph of the complaint to which the evidence seems to have been addressed charges, that the negligence consisted in the employees of the railway company backing a locomotive engine and certain cars under their control and management over and upon Hampton, without giving him warning of their approach, and in violation of sections 1 and 11 of an ordinance of the city of Indianapolis, the accident having occurred in that city.

These sections provided, in substance, that it should be the duty of every engineer, conductor, or other person engaged in running a locomotive engine, to ring the bell attached thereto whenever the same should be moving through the city; and that it should be unlawful to run any locomotive or train of cars backward in or through the city without stationing a watchman or other person on the rear end of the train, in order to avoid accidents.

The jury returned a general verdict for the plaintiff, assessing his damages at four thousand dollars. They also re-

turned answers to fifty-two special interrogatories. There was a judgment upon the verdict.

Various incidental questions are presented, but upon careful consideration it seems to us that the merits of the whole controversy are all involved in a single inquiry, and that is, can the verdict and judgment be maintained upon the undisputed facts as they are disclosed by the record?

We shall regard the special findings of the jury, together with the admitted facts, and such as are supported by reasonable and uncontradicted evidence, as embracing the established facts in the case.

Briefly stated, the facts thus established are as follows: On the 15th day of November, 1883, and for some time prior thereto, the plaintiff's intestate, an experienced switchman and brakeman, familiar with the locality and the movements of trains at the place where he was injured, was in the service of the Indianapolis and St. Louis Railway Company, attending a switching engine, which was used in transferring cars from one point to the other in the city of Indianapolis, on and over the tracks of the Union Railway Company. At the point where the injury occurred, and for some distance either way, the Union Railway Company had two tracks lying parallel with each other, running substantially east and west. There was an intervening space of seven feet and ten inches between the north rail of the south track and the south rail of the north track. In this space there was a switch standard, the center of which was three feet and eight inches from the north rail of the south track, and four feet and two inches from the south rail of the north track. This standard was designed for use in moving a switch for the purpose of switching cars on and off the north track. The tracks were of standard gauge, and box-cars, passing over them, extended over the rails from one foot eight inches to two feet two inches.

The appellant's track, and the tracks of other railways, connect with the Union tracks, which are used under certain

regulations by the several railway companies centering in the city for switching cars and other local purposes. At the time of the accident the Union tracks were being used by the appellant and the Indianapolis and St. Louis Railway, a train belonging to the latter company having backed from the east over the south track, passing over a switch to the north track, where it was standing, or slowly moving.

In the line of his duty the plaintiff's intestate had occasion to go to the switch standard above described in order to adjust the track for the movement of the train, with the operation of which he was connected. While he was occupied about the matter of attending to the switch, the appellant's servants were backing a train, consisting of an engine and three box-cars attached thereto, westwardly, in the direction of the switch standard, along the south track. They were proceeding at a rate of speed less than four miles an hour, with the bell ringing continuously, and a full complement of men at their proper places, one of the brakemen occupying a place as lookout on the rear car of the backing train. The train thus backing was in full view of the switch standard, at or near which the deceased was struck, for a distance of one hundred and forty-two feet, and the jury find that the deceased could have seen the approaching train if he had looked in that direction. The uncontradicted testimony of the brakeman who was on the rear end of the backing train was to the effect, that when the train came in sight of the standard he saw and recognized the deceased walking westwardly, toward the standard, and that he was at that time a car-length or more distant therefrom. Whether he was walking on the track or in the space between does not very clearly appear. When within eight or ten feet of the standard the deceased looked directly at the backing train, and the watchman on the rear car, believing that the deceased saw the train, gave him no special warning of its approach. It does not clearly appear whether the deceased had thrown, or was just about to throw or turn, the switch as the train

neared the standard, but while at or about the standard he was struck by the projecting side of the rear car and thrown upon the track and crushed by the wheels, so that death ensued shortly thereafter.

Keeping in view the well settled rule, applicable in all cases of this character, that the plaintiff assumes the burden of proving that the injury complained of resulted from the negligence of the defendant, without any concurring fault on the part of the person injured which contributed to produce the injurious consequences, we proceed to consider the questions presented by the foregoing facts.

On behalf of the appellee it is ingeniously argued that the case was made out within the recognized rules, because, it is said:

1. The appellant's employees were acting negligently and in violation of the spirit of the ordinance of the city of Indianapolis, heretofore referred to, in that the watchman, who, according to the requirement of the ordinance, was stationed on the rear end of the train in order to avoid accidents, neglected his duty, by failing to warn the deceased of the approaching train.

2. The appellee contends, notwithstanding the deceased might have seen the train at any time after it arrived within a distance of one hundred and forty-two feet from the place where he was injured, that he was occupied with duties which necessarily absorbed his entire attention, and that hence, in the absence of special warning from the watchman on the rear car, he was guilty of no contributory negligence in failing to look, and in not avoiding contact with the moving train.

It is a well settled and reasonable proposition that an employer, who places an employee in a perilous situation, and exacts of him duties which necessarily require his attention and absorb his mind, must exercise vigilance in protecting the employee from perils not directly arising from the work in hand. Wood Master and Servant, section 368.

Although an employee assumes all the hazards reasonably incident to the service in which he engages, he has a right to rely on the fact, when placed in a situation of danger, where engrossing duties are required of him, that the employer will not, without proper warning, subject him to other perils unknown to the employee, and from which the work exacted necessarily distracts his attention. *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Atlas Engine Works* v. *Randall*, 100 Ind. 293 (50 Am. R. 798); *Haley* v. *Case*, 142 Mass. 316.

It may well be, therefore, where a person is rightfully on a railroad track in the discharge of duties which absorb his attention, that it would be regarded as negligence for those having the management of trains, and who are, or should be, aware of the presence of a person so situate, to permit engines or cars to be run upon him while so employed, without giving sufficient warning to enable the person thus engaged to escape the danger. Under such circumstances, those who have the control and management of trains have no right to assume that persons who are required to be attentively engaged upon the track, or under or about cars upon the track, will look out for moving trains, or apprehend danger in the absence of such customary signals, or other warning, as the circumstances require and as they are led to rely upon.

Thus, in *Goodfellow* v. *Boston, etc., R. R. Co.*, 106 Mass. 461, the plaintiff and others were employees of a contractor who was engaged in constructing a wall to support the railroad. While holding a rope attached to a derrick in actual use, a locomotive engine, without any bell rung or signal given, ran upon the plaintiff, who knew of, and relied upon, the custom of the company to ring the bell or sound the whistle whenever an engine approached men working upon the track. It was held that the railroad company was guilty of negligence, and that the facts should have been submitted to the jury for their determination, as to whether or not the plaintiff was guilty of contributory negligence. So, also, in

Crowley v. *Burlington, etc., R. W. Co.*, 65 Iowa, 658 (20 N. W. Rep. 467), an employee of the company was engaged in clearing a high bank of snow and ice from the track. He was struck by a train, run at an inordinate rate of speed and without signals, and in violation of an ordinance, and it was held that the employee had a right to suppose that his employer would exercise care to avoid injuring him by sending cars along the track at an unlawful rate of speed. See, also, *Quirk* v. *Holt*, 99 Mass. 164; *Ominger* v. *New York, etc., R. R. Co.*, 4 Hun, 159; *Mark* v. *St. Paul, etc., R. W. Co.*, 32 Minn. 208 (20 N. W. Rep. 131).

Where those having the control and management of trains become aware of the presence of a person on the track, and have reason to believe from his appearance or from the manner in which he is occupied that he is either unconscious of, or unable to avoid, the danger of contact with the cars, it becomes their duty to use every reasonable effort to stop the train and arouse the attention of the person on the track. Unless those controlling the train have reasonable assurance that a person who is seen at work on the track is aware of the approach of the train, and that he is in a condition to apprehend and avoid the danger, they are guilty of negligence if they fail to give warning and stop the train. *Indianapolis, etc., R. W. Co.* v. *Pitzer*, 109 Ind. 179, and cases cited.

Propositions kindred to those above stated are abundantly supported by the authorities, but the facts under consideration do not bring this case within any of the principles referred to.

The deceased was not placed in a perilous position by the appellant, nor by any one toward whom it sustained any relation of privity; nor did the nature of the work in which he was engaged necessarily require him to be absorbed in his duties upon the track over which the appellant's train was passing, nor do the facts disclosed make it appear that he was actually so engaged.

The most that can be said is, that, while engaged in the ordinary duties incident to the position of a switchman, the deceased was upon common ground, where the trains and servants of all railroads using the Union tracks had a right to be in their order.

His situation, as regards the appellant, was in no material respect different from that of a traveller at or upon a highway crossing.

The appellant owed the duty of operating its train in careful compliance with the city ordinance, and with a due regard for the safety of all those who were in the exercise of corresponding rights or duties upon the tracks and grounds of the Union Company, or of those who might be found on the company's tracks and grounds.

Its employees had the right to assume that the servants of other companies, who were in the discharge of duties upon the tracks and grounds of the Union Company, would observe a degree of care commensurate with the known perils of the situation and the duties required of them.

When the appellant had properly manned its train, and stationed a watchman on the rear car, its employees were justified in assuming, while backing at a rate of speed less than four miles an hour and ringing the bell continuously, that all persons who had arrived at years of discretion, and who were in a situation to see the train, and who were not so engaged as to render them oblivious to its approach, would avoid contact with the cars.

When the watchman on the rear car observed the deceased walking toward the switch standard, presumably upon the open space between the north and south tracks, he had a right to assume that the latter had observed that which he could have seen and heard if he had been giving ordinary attention to the situation, and that he would not thrust himself into a position where he would be certainly injured.

Persons in the control of railroad trains have a right to presume that men of experience will act reasonably in all

given contingencies. They are not bound to anticipate and provide against extraordinary, unusual and improbable conditions, which involve inattention on the part of others, and their duty to persons who are thus situate only begins when they have good reason to suppose that such persons are unconsciously in peril, or disabled from avoiding it. It is a presumption that a person of mature age, and in the possession of his faculties, will exercise care for his own safety, and that he will not go or remain in a perilous position, when a slight effort would carry him to a place of safety. Accordingly, a watchman or lookout on a train, moving slowly, with bell ringing, may presume, when he observes a man walking soberly on or near the track, that such person has observed the train, if by the exercise of care he could have observed it. He may, therefore, reasonably presume, unless something indicates the contrary, that the person on the track will step aside so as to avoid any injury. *Indianapolis, etc., R. R. Co.* v. *McClaren*, 62 Ind. 566; *Lake Shore, etc., R. R. Co.* v. *Miller*, 25 Mich. 274; *St. Louis, etc., R. R. Co.* v. *Manly*, 58 Ill. 300; Beach Cont. Neg. 394; *Terre Haute, etc., R. R. Co.* v. *Graham*, 95 Ind. 286 (48 Am. R. 719); *Telfer* v. *Northern R. R. Co.*, 30 N. J. 188.

Adding to the foregoing considerations the reasonable and uncontradicted testimony of the watchman, who testified that the deceased, when about ten feet from the switch standard, at which he was struck, looked directly at the approaching train, and there is absolutely no ground upon which it can be said the watchman was blameworthy.

True, the ordinance required that a watchman should be stationed on the rear end of each backing train, but this did not require that the watchman so stationed should stop the train or sound a trumpet whenever he saw some person of mature age who might possibly, by inattention, come in its way.

Especially is this so when the watchman knew that the person ahead could see the approaching train, and when he

had every reason to believe that such person actually did see the train, and was in a situation to avoid danger by the exercise of his own volition. Precaution beyond the requirements of the ordinance was a duty only in case there was reasonable ground for apprehension.

Sometimes railroad companies are required to station flagmen at dangerous crossings. The duties of a flagman are in some respects analogous to those of a watchman, under the ordinance in question.

In *Pakalinsky* v. *New York, etc., R. R. Co.*, 82 N. Y. 424, speaking of the duties of a flagman, the court said: "The duty of a flagman is to notify travellers crossing the railroad of the approach of trains; and when a traveller knows of the approach of a train, and sees it approaching, as to him the flagman has no duty to perform."

Assuming that the unimpeached testimony of the watchman was true, and a diligent examination of the record fails to disclose any evidence or circumstance which authorizes us to disregard it, and there is nothing in the case which justifies an imputation of negligence against the company, or shows that it failed to observe the ordinance of the city, not only literally, but according to its spirit and purpose. *Randall* v. *Baltimore, etc., R. R. Co.*, 109 U. S. 478.

We do not assent to the view that an experienced switchman, acquainted with the perils attending the performance of his duty at a particular locality, is, because of the nature of his employment, exempt from the obligation of exercising the same degree of vigilance for his own safety, in respect to the trains of other railroad companies, as would be required of a traveller or other person rightfully at the same place.

The rule has become so familiar that a reference to the authorities is unnecessary, that a person who goes, or is about to go, upon a railroad track, even at a place where he has a right to be, must use the means reasonably available to him in order to avoid injury from moving trains. Persons who suffer injury while disregarding this rule are without remedy,

and those who had the opportunity of knowing the peril must be assumed to have had the knowledge which their opportunities afforded them. *Pennsylvania R. R. Co.* v. *Henderson*, 43 Pa. St. 449; Patterson Railway Accident Law, 50.

It would be manifestly unreasonable to apply one rule to travellers and others lawfully on the tracks of the Union Railway Company, and a different rule to the employees of the several companies, when both are substantially surrounded by the same circumstances.

Of course, in case an employee, or any other person, is actually absorbed in duties upon the tracks which necessarily divert his attention and prevent him from observing what he might see under other circumstances, and that fact is known to the company charged with the default, a different question is presented.

"If a very high degree of care is required of strangers coming upon a railroad track, to avoid injury, as much, or more, should be demanded of one who is familiar with the place, and can not but know it is pregnant with danger. Neither can go recklessly upon the road, taking no proper precautions to avoid accidents." *Chicago, etc., R. W. Co.* v. *Sweeney*, 52 Ill. 325. *Cincinnati, etc., R. R. Co.* v. *Butler*, 103 Ind. 31; *Schofield* v. *Chicago, etc., R. W. Co.*, 114 U. S. 615; *Holland* v. *Chicago, etc., R. R. Co.*, 5 McCrary, 549.

How can it be said, in the absence of any special circumstances, that an experienced switchman, who was proceeding, so far as appears, with his usual and customary duties between two tracks, where the observance of care would have enabled him to perform those duties in safety, was absorbed in his duty to a greater extent than would be a person driving his team across a railway track?

It was not shown that there was anything peculiar about the switch, or that it was different from those in common use, or that there was any emergency calculated to divert the attention or create confusion in the mind of the deceased; nor did it appear that he was thrown off his guard by any

act or omission of the appellant. It does not appear but that the switch standard could have been safely approached upon the space between the tracks, nor that it could not have been efficiently operated standing within the space, clear of all danger from contact with cars on the adjacent track. To hold that the deceased was without fault would require us to assume that he was compelled, in the discharge of his duty, to go upon the track, or to occupy a position where a moving train would come in contact with his body, and that he might do this without taking precautions, readily available to him, for his own safety. We have been unable to discover any evidence from which it appears that a person operating the switch in question, exercising ordinary care, would necessarily be in danger of contact with the cars; nor can we assent to the proposition that a switchman may, under such circumstances, expose himself without looking, and yet be free from fault.

It is for those who enter into employments of a dangerous character, or who work at dangerous places, to exercise all that care and caution which the nature of the employment or the situation in which they are employed demands. *Tuttle* v. *Detroit, etc., R. R. Co.*, 122 U. S. 189; *Brennahan* v. *Michigan Central R. R. Co.*, 8 Am. & Eng. R. R. Cases, 147 (49 Mich. 410).

As is said by a learned author, one thus employed "may not wait to be told, but must act affirmatively. * * He must not go blindly and heedlessly to his work, when there is danger." Beach Cont. Neg., section 138.

Our conclusion is that the facts do not make a case of negligence against the railroad company. Besides, the legitimate inference that the deceased could only have suffered injury from want of attention to the danger of the situation is not rebutted or explained in the evidence.

While it can not be said that the special findings are so clearly inconsistent with the general verdict as to justify a

judgment notwithstanding the general verdict, we are of opinion that the court erred in not sustaining the appellant's motion for a new trial on the ground that the evidence does not sustain the verdict.

These conclusions render it unnecessary that we should consider and decide some incidental questions which arise on the record.

Judgment reversed, with costs.

Filed Oct. 21, 1887.

ELLIOTT, J.—I concur in the conclusion that there was no negligence on the part of the appellant, but dissent from the conclusion that the appellee's intestate was guilty of contributory negligence.

Filed Oct. 21, 1887.

No. 14,009.

DICKERSON ET AL. *v.* FRANKLIN.

TAXES.—*City and Town.—Unplatted Agricultural Lands Lying Within.—Percentage of Taxation.—Statute Construed.*—Under section 3261, R. S. 1881, unplatted agricultural lands, containing five acres or more, lying within the limits of a city or incorporated town, are not taxable by the city or town for general city or town purposes at a higher aggregate percentage than the aggregate percentage of the tax levied in the civil township for general township purposes; but such lands are subject to all special assessments which affect them in common with other property of the city or town.

From the Owen Circuit Court.

E. C. Steele and *W. Hickam*, for appellants.

S. O. Pickens, for appellee.

NIBLACK, J.—A controversy existed between Orris T. Dickerson, auditor of Owen county, and William B. Haltom, treasurer of that county, on the one side, and William M. Franklin, a resident citizen of the town of Spencer, an incorporated town of the same county, on the other side, concerning the levy and collection of certain taxes assessed against Franklin.

The parties appeared voluntarily in the court below and submitted the matters in controversy between them to the decision of that court, upon an agreed statement of facts, under the provisions of section 553, R. S. 1881.

The agreed statement of facts was substantially as follows: That Franklin was the owner of two tracts of land, one in section 20 and the other in section 29 in township 10 north of range 3 west; that they joined each other and constituted one farm containing one hundred and thirty-five acres, and were together appraised for taxation at the sum of $6,130; that said lands were unplatted and were situate within the corporate limits of said town of Spencer; that Franklin was a taxpayer of said town as well as of the county of Owen; that said town of Spencer was situate within Washington township of said county; that the tax levy was, in said township of Washington, on each $100, as follows: State taxes, 12 cents; State-house tax, 2 cents; State school tax, 16 cents; endowment tax, ½ cent; county taxes, 49 cents; township taxes, 10 cents; tuition tax, 20 cents; special school tax, 5 cents; turnpike road tax, 1½ cents; road tax, 15 cents; total, $1.31; that the tax levy in said town of Spencer was: State tax, 12 cents; State-house tax, 2 cents; State school tax, 16 cents; endowment tax, ½ cent; county taxes, 49 cents; corporation tax, 10 cents; tuition tax, 25 cents; special school tax, 30 cents; turnpike road tax, 1½ cents; sinking fund tax, 2 cents; interest tax, 10 cents; fire tax, 3 cents; road tax, 10 cents; total, $1.71; that these levies of taxes were for the year 1886; that no part of these lands is used for anything other than agricultural purposes; that Franklin

had paid the tax on said lands to the amount of $1.31 on each $100 valuation, and had refused to pay more; that Dickerson, as auditor, and Haltom, as treasurer, of said county of Owen, were claiming from Franklin the additional sum of $24.52 as a balance of taxes still due said town on said lands; that Franklin had demanded of Dickerson, as such auditor, a remission of said sum of $24.52 so claimed as still due, but that Dickerson had declined to remit the same; that Haltom, as such treasurer, was threatening to collect the said sum of $24.52 from Franklin as a balance of taxes lawfully due from him; that the said Dickerson and Haltom were authorized in their respective official capacities by said town of Spencer to collect all taxes due said town; that the only question to be decided was as to whether the said Dickerson and Haltom, or either of them, upon the facts as stated, had a right to collect from Franklin any sum, as taxes against the lands in question, additional to what he had already paid, and if so, how much?

Upon full consideration the circuit court came to the conclusion and decided that the lands were subject to the State and county tax, and to the town school tax, also to such other special assessments as affect said lands in common with all other town property, and to a tax for general town purposes equal to the aggregate percentage of the levy in the civil township of Washington for township purposes—that is to say, State taxes for all purposes, 30½ cents on each $100; county tax, 49 cents; tuition and special school taxes, 55 cents; special assessments, of which 10 cents was for road tax, 11½ cents; turnpike road tax, 1½ cents; and corporation tax, 10 cents, making a total of $1.56 on each $100 valuation of property; and that Franklin was still liable to pay an additional tax of 25 cents on each $100 valuation of said lands, and no more.

A proper decision of the merits of the controversy in this case involves a construction of section 3261, R. S. 1881, and both parties unite in requesting that we shall give that sec-

tion a more extended and detailed construction than has been heretofore given it. The section is as follows: "Lands lying within the limits of any city or incorporated town in this State, that are not platted as city or town property, and are not used for other than agricultural purposes or are wholly unimproved, together with all personal property used for the purpose of farming on such lands, shall not be taxed in such city or town, for all purposes, at a higher aggregate percentage upon the appraised value thereof than the aggregate percentage of the tax levy in the civil township wherein such property is situated: *Provided, however*, That the provisions of this act shall not apply to parcels of land containing less than five acres."

This section was construed by this court in the case of *Leeper* v. *City of South Bend*, 106 Ind. 375. It was then, in legal effect, held that the declaration that the class of lands described "shall not be taxed in such city or town, for all purposes, at a higher aggregate percentage" than in said section stated, means that such lands shall not be taxed *by* the city or town for general city or town purposes at a higher aggregate percentage than the aggregate percentage of the tax levied in the civil township for general township purposes; but that lands of that class are subject to all special assessments by the city or town which affect them in common with the other property of the city or town.

We adhere to the construction then given, regarding it still as more in accordance with reason and justice, and with the probable intention of the Legislature in enacting the section, than a more strictly literal construction would be. The general conclusion announced by the court below, being in accordance with the construction thus heretofore given by us, must be held to have been a reasonable conclusion, and to have, therefore, stated the law of this case, as applicable to the facts, correctly.

In its application of the general principles announced by

it to the various classes of taxes embraced in the statement of facts, the court below evidently intended to be understood as holding that the State, State-house, State school, endowment, county, tuition, special school, the turnpike road and road taxes levied and charged against Franklin's lands were lawfully so levied and charged, and that the 10 cents on the $100 levied as a corporation tax, corresponding as it did with the amount levied by the civil township for township purposes, was, standing alone, a proper tax against those lands; but that, adding 10 cents for interest tax, 2 cents for sinking fund tax, and 3 cents for fire tax, the gross amount levied for strictly town purposes was greater by 15 cents on the $100 than that levied by the civil township for township purposes, and was to that extent in excess of the amount permitted to be levied by the section of the statute under consideration.

As thus understood, we think the court below made a substantially correct application of the general principles announced by it as above stated.

Deducting this excess of 15 cents on the $100 from the gross amount of the several taxes levied on the property of the town of Spencer generally, there remained the sum of $1.56, or, which is practically the same thing, $1.56½, on the $100 which was a proper charge against the lands owned by Franklin.

We accept this construction upon the theory that the levy for the sinking fund was presumably made to reimburse the town for money theretofore expended for general town purposes, and upon the further theory that the fire tax was levied in aid of, and as auxiliary to, the general expenses of the town, under the provisions of section 3333, R. S. 1881.

It will be observed that the limit placed upon the levy of taxes upon exclusively agricultural lands by a city or town results from the action which the proper *civil* township may have taken in making a corresponding levy, and not from anything which may be done by the *school* township, embrac-

ing the same territorial limits. *City of South Bend* v. *University of Notre Dame*, 69 Ind. 344.

The judgment is affirmed, with costs.

Filed Oct. 21, 1887.

119 188
119 534
112 183
145 583
112 189
166 339
166 406

No. 13,864.

BROOKE v. LOGAN.

PARENT AND CHILD.—*Custody of Child.—Estoppel.*—Where a parent places his child in the care and keeping of another, verbally agreeing that the latter may have the custody of such child during minority, he is not thereby estopped to afterwards reclaim its custody.

SAME.—*Fitness of Father.—Right to Custody as Against Guardian.*—If a father is a suitable person he is entitled to the custody of his infant child as against its statutory guardian; but the controlling consideration is the welfare of the child, and if a sufficient reason exists why the father should not have its custody, it will be given to others better fitted.

SAME.—*Res Judicata.—Appointment of Guardian.*—In order that the appointment of a statutory guardian may be conclusive as against the father's right to the custody of his child, it must appear that he was in court in such manner that the question of his fitness must have been passed on in appointing the guardian.

SAME.—*When Question of Custody Conclusively Settled.*—The question of the custody of a minor child, once properly and finally adjudicated, whether in *habeas corpus* proceedings or otherwise, is settled for all time, unless there be an appeal, and the judgment can not be attacked collaterally.

SAME.—*Habeas Corpus.—Proceeding to Remove Guardian.*—In a proceeding by a father to have the statutory guardian of his child removed and himself appointed, a judgment refusing to grant such relief does not involve the right to the custody of the child, and is not a bar to a proceeding by *habeas corpus*.

SAME.—*Return to Writ.—Sufficiency of.*—Where the return to the writ of *habeas corpus* is good upon one ground it is sufficient as against a general exception to it.

From the Marshall Circuit Court.

C. Kellison, for appellant.
A. C. Capron, for appellee.

ZOLLARS, C. J.—Appellant instituted this proceeding of *habeas corpus* against appellee to recover from him the custody of his, appellant's, daughter, near five years of age. He seeks her custody upon the ground that he is her father, and has a good home for her, and that he and his wife, who is a second wife without children, are suitable persons to be entrusted with her custody, care and education. He alleges in his petition, amongst other things, that, notwithstanding his demand upon appellee, he has refused to surrender the custody of the child.

In his return to the writ, appellee states the several grounds upon which he claims the custody of the child as against appellant, which may be summarized as follows:

1st. When the child was a mere babe, appellant placed her in the care and custody of appellee and his wife, who is a relative of the child. After she had been with them for about a year, appellant gave up and surrendered to them her care and custody so long as she should remain a minor.

2d. At appellant's request, and to carry out the agreement as to the custody of the child, appellee made the proper application and was duly appointed the guardian of her person and estate.

3d. Prior to the commencement of this proceeding, appellant made application to the court for the removal of appellee, and for the appointment of himself in his stead, as such guardian of the person and estate of the child, stating in his application the same facts as the basis of his right to the custody of the child as are stated in his petition in this case. Appellee appeared to the application, and the court, after hearing evidence, found against appellant, and refused to remove appellee, or to appoint appellant as such guardian of the person and estate of the child. The judgment of the court in that case is yet in full force.

4th. "The petitioner is not a fit and suitable person to have the care and custody of the child."

We examine the grounds upon which appellee claims the custody of the child in the order above stated:

1st. The placing of the child in the care and keeping of appellee, and the verbal agreement by appellant that he might have her care and custody during her minority, did not, of themselves, estop appellant from thereafter reclaiming that custody. The rulings of this court have been uniform upon that question, and in accord with authority in England and most of the American States. It will be sufficient here to cite some of the authorities without extending this opinion to state the reasons upon which they rest. *Dalton* v. *State*, 6 Blackf. 357; *State, ex rel.*, v. *Banks*, 25 Ind. 495; *Wishard* v. *Medaris*, 34 Ind. 168; *Child* v. *Dodd*, 51 Ind. 484; *Copeland* v. *State, ex rel.*, 60 Ind. 394; *Johns* v. *Emmert*, 62 Ind. 533; *McGlennan* v. *Margowski*, 90 Ind. 150; *McKenzie* v. *State, ex rel.*, 80 Ind. 547; *Lee* v. *Back*, 30 Ind. 148; Schouler Domestic Relations, section 251, and cases there cited; Church Habeas Corpus, section 428.

2d. The appointment of appellee as guardian of the person and estate of the child did not, of itself, deprive appellant, as the father, of her custody. Section 2518, R. S. 1881, is as follows: "Every guardian so appointed shall have the custody and tuition of such minor, and the management of such minor's estate during minority, unless sooner removed or discharged from such trust: *Provided*, That the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor." If the father is a suitable person, he has a right to the custody of his infant child as against the statutory guardian. So the statute declares and so it has been held. *Garner* v. *Gordon*, 41 Ind. 92 (104); *Johns* v. *Emmert*, *supra*; *Bryan* v. *Lyon*, 104 Ind. 227; *State* v. *Baldwin*, 5 N. J. Eq. 454; *State* v. *Clover*, 16 N. J. 419; *State* v. *Nachtwey*, 43 Iowa,

653; *People* v. *Mercein*, 3 Hill, 399; *Regina* v. *Smith*, 16 Eng. L. & Eq. 221; *State* v. *Smith*, 6 Maine, 462; *Pool* v. *Gott*, 14 L. R. 269.

In order that the appointment of a statutory guardian may be conclusive as against the father's right to the custody of his child, it must in some way appear that he was in court in such manner that the court, in appointing the guardian, must have passed upon the question of his fitness to have such custody. Such is not the case here.

3d. Appellant's counsel passes the third ground upon which appellee claims the custody of the child with the remark that the doctrine of *res adjudicata* does not apply to *habeas corpus* proceedings.

In that counsel is very clearly mistaken. The question of the custody of a minor child, once properly and finally adjudicated, whether in a *habeas corpus* proceeding or otherwise, is settled for all time, unless there be an appeal, and the judgment rendered is impregnable as against a collateral assault.

A subsequent writ may be awarded, but upon the subsequent hearing evidence will not be heard which goes back of the previous adjudication. *Mercein* v. *People*, 25 Wend. 64; Freeman Judgments, section 324; Church Habeas Corpus, section 387, and cases there cited; *Dubois* v. *Johnson*, 96 Ind. 6 (14); Tyler Infancy and Coverture, p. 291; *People* v. *Mercein*, *supra*.

We think, however, that the adjudication upon appellant's application to have appellee removed and himself appointed guardian of the child is not conclusive as against this proceeding.

These tests have been applied in determining whether or not the cause of action in two cases is the same, and whether, therefore, an adjudication in one is a bar to the other:

In the case of *Taylor* v. *Castle*, 42 Cal. 367 (372), it was said: "The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judg-

ment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former."

That the cause of action in two cases is the same is a test by which it is determined that an adjudication in one is a bar to the other. Herman Estoppel and Res Judicata, sections 106, 107, 111; *Kalisch* v. *Kalisch*, 9 Wis. 529; *Stowell* v. *Chamberlain*, 60 N. Y. 272.

In the case of *Veeder* v. *Baker*, 83 N. Y. 156 (160), it was said that a cause of action may be said to be composed of the right of the plaintiff and the obligation, duty or wrong of the defendant, and that it is sufficiently accurate to say that these combined constitute the cause of action.

Applying those tests, it can not be said that the judgment of the court in refusing to remove appellee and appoint appellant as guardian is a bar to this proceeding.

In that proceeding what may be called the right of the plaintiff was the right to have appellee removed and himself appointed guardian of the person and estate of the child in his stead. In this proceeding the right asserted on the part of the plaintiff is simply the right to have the custody of the child, as that right is given him by the statute under which appellee was appointed. Nor would the evidence necessary to sustain this proceeding or action, without more, have sustained the former proceeding or action. This proceeding may be sustained by evidence which in no way affects appellee's rights, powers and duties as guardian under the statute. In that proceeding it was necessary to go further, and show some cause why he should be removed as such guardian both of the person and estate of the ward.

4th. It is stated in general terms, as we have seen, that appellant is not a fit and suitable person to have the custody and education of his daughter.

It is contended that that statement is too general. On the other hand, it is contended that the exception to the return

is too general. There is ground for both contentions, under the rules of correct pleading, but we think that the return should not be overthrown upon the ground stated. Doubtless the court, upon a proper motion by appellant, might have required the return to be made more certain.

We hold the return good, therefore, upon the one ground that it asserts the unfitness of appellant to have the custody, care, training and education of the child. Being sufficient upon that ground, it will stand as against the general exception made to it.

This brings us to the evidence. We do not think it necessary to set out the evidence in detail, nor to give an extended summary of it. It is enough to say that appellant is the father of the child, and that he and his wife, who is a second wife, without children, are shown, without conflict in the evidence, to be persons in every way fit and suitable to be entrusted with the custody, care, training and education of the child; that he denies that he made any permanent surrender of the custody of the child to appellee, and that since it has been in his custody he, appellant, has contributed somewhat towards its support.

On the other hand, while it is shown that appellee's wife has, in the main, done a mother's part by the child, and at a time when it most needed a mother's care, there is evidence tending to show that she has discriminated, in some measure, in favor of her own children; and it is shown that things have occurred in the family that ought not to occur in the presence and hearing of children.

It is said by counsel for appellee that it could have been shown that appellant is not in all respects a fit and suitable person to have the custody and training of his child, but that the court below regarded it as unnecessary.

If there is any thing showing, or tending to show, that appellant is not a proper person to have the custody, training and education of the child, it should have been brought for-

ward and shown. While the law awards the custody of minor children to the father as against the statutory guardian, it is only when he is a fit and suitable person to have such custody.

In each case due regard will be given to the feelings and wishes of the father, yet the controlling consideration is the welfare of the child, and if a sufficient reason exists why the father should not have the custody of the child, it will be given to others better fitted to have such custody, and for the training and education of the child. When the father is a fit and suitable person to have the custody and care of the child, he is entitled to it, by force of the statute, as against the statutory guardian. See *Jones* v. *Darnell*, 103 Ind. 569 (53 Am. R. 545), and cases there cited; *Bryan* v. *Lyon*, 104 Ind. 227 (54 Am. R. 304), and cases there cited.

Upon the whole case, as presented by the evidence, we feel constrained to hold that the judgment must be reversed.

Judgment reversed, with costs, and cause remanded, with instructions to the court below to sustain appellant's motion for a new trial.

Filed Oct. 22, 1887.

Dissenting Opinion.

Niblack, J.—I agree generally to the conclusion reached in this case, but can not concur in the intimation given that the question of the custody of a minor child may be settled in an incidental way at the time, and as a part of the proceedings, when letters of guardianship over its person and estate are applied for and issued.

An application for letters of guardianship is, in its nature, *ex parte*. If the question of the custody of a child may then be so settled, I can not see upon what principle such custody may not be determined upon an application for the removal of a guardian. Such an application is an adversary proceeding, requiring notice to the guardian, and involving a judicial

inquiry. *Dibble* v. *Dibble*, 8 Ind. 307. Such an inquiry may, therefore, be made to take a wider range, and to be, hence, much more comprehensive than proceedings upon an application for letters of guardianship.

Filed Oct. 22, 1887.

No. 12,754.

FUNK *v.* BEVERLY.

112 190
139 467
112 190
146 684

SLANDER.—*Words not Actionable Per Se.*—The words "I know all about that case; while she was out there claiming to be the wife of George W. Funk, she was back here claiming to be my wife," do not impute a want of chastity and are not actionable *per se*.

SAME.—*Justification.—Insufficient Answer.*—An answer by the publisher of libellous words that he heard them from another, and that it is true that he did hear them, is not a justification; but to constitute a justification it must be averred that the plaintiff was guilty of the wrong or crime imputed by the words used.

From the Warren Circuit Court.

J. G. Pearson and *W. P. Rhodes*, for appellant.

I. E. Schoonover and *W. B. Reed*, for appellee.

ELLIOTT, J.—The alleged slanderous words given as the cause of action in the third paragraph of the appellant's complaint are these: "I know all about that case; while she was out there claiming to be the wife of George W. Funk, she was back here claiming to be my wife." These words do not impute a want of chastity and are not actionable *per se*. *Emmerson* v. *Marvel*, 55 Ind. 265; *Schurick* v. *Kollman*, 50 Ind. 336; *K*—— v. *H*——, 20 Wis. 239. The court did right in sustaining the demurrer to the third paragraph of the complaint.

The fourth paragraph of the complaint charges that the defendant wrote and published of the plaintiff, among other libellous words, the following: "That the defendant was approached by one William Washburne, who was then a single man living near Attica, Indiana, and was told by said Washburne that he, Washburne, had been with said Melissa Funk at a camp-meeting at Meharry's grove in the fall of 1870, and while there he had taken said Melissa Funk into a tent by themselves and had laid in there with her, and said Washburne gave the defendant to believe that he had intercourse with her, and when defendant asked him if it was true that he had intercourse with her, he, Washburne, admitted that he had." Other libellous words are alleged, but we do not now deem it necessary to quote them.

The first paragraph of the answer is intended as a plea of justification and is addressed to the entire complaint. It avers generally that the words spoken and written by the defendant were true, and then proceeds specifically to affirm their truth. So far as concerns the libellous words quoted from the complaint, the specific allegations of the answer are these: "That he was also approached by William Washburne, then a single man, and was told by him that he, Washburne, had been with plaintiff at a camp-meeting at Meharry's grove in the fall of 1870, and that, while there, he had taken the plaintiff into a tent by themselves and had laid in there with her, and said Washburne gave the defendant to believe that he had intercourse with her at said camp-meeting, and when this defendant asked him if it was true that he had intercourse with her, he said he had."

In the concluding part of the answer it is alleged: "So that all the words charged to have been spoken and published by defendant of and concerning plaintiff were and are true in the sense in which it is alleged they were spoken."

It is clear that this answer does not aver that the appellant did in fact have carnal intercourse with Washburne; it goes no further than to assert that Washburne did tell the

defendant that such intercourse did take place. The theory of the answer is, that the defendant is justified because he repeated what was told him, and that it was true that he was told what he repeated. The truth of the charge against the appellant is not affirmed; nothing more is affirmed than that it is true that Washburne did tell the defendant what he repeated in his written and oral statements. There is no justification of the charge against the chastity of the appellant, for there is no averment that the charge is true, but the averment is, in effect, that the truth is, that Washburne did speak to the defendant the words which he repeated to others.

The theory upon which the answer is constructed is radically unsound. The fact that the publisher of libellous words avers that he heard them from another, and that it is true that he did hear them, is no justification. To constitute a justification it must be averred that the plaintiff was guilty of the wrong or crime imputed to her by the libellous or slanderous words. It is the charge contained in the words that must be justified. It is not enough for the defendant to aver that it is true that he did hear the words spoken, as he asserted. If he repeats the slanderous words he must be prepared to prove their truth or suffer the legal consequences. An English author thus states the law: "Each repetition is a fresh defamation, and the defendant by repeating A. B.'s words has made them his own, and is legally as liable as if he had invented the story himself. The only plea of justification which will be an answer to the action must not merely allege that A. B. did in fact say so, but must go on to aver with all necessary particularity that every word which A. B. is reported to have said is true in substance and in fact." Odgers Libel and Slander, 172. Our own cases affirm this doctrine. *Sunman* v. *Brewin*, 52 Ind. 140; *De Armond* v. *Armstrong*, 37 Ind. 35; *Johnson* v. *Stebbins*, 5 Ind. 364.

The general rule is, that general averments in a pleading are controlled by the specific statement of facts. *Reynolds* v. *Copeland*, 71 Ind. 422; *State, ex rel.*, v. *Casteel*, 110 Ind.

174, and cases cited p. 187. Under this rule the general statement must necessarily yield to the specific allegations, for they clearly show that the original libellous charge is not justified, but that the justification is of the truth of the statement that the libellous words were spoken to the defendant by Washburne. This rule of pleading applies with peculiar force to a plea of justification, for, as said in *Mull* v. *McKnight*, 67 Ind. 535, "to make an answer in justification good, it must specifically point out the acts of which the plaintiff was guilty, that the court may see whether the defendant was justified in speaking the words complained of."

Judgment reversed.

Filed Oct. 22, 1887.

No. 12,904.

JONES v. THE STATE, EX REL. SNODGRASS.

OFFICE AND OFFICER.—*Title to Office.—Quo Warranto.—Civil Remedy.—Pleading.*—An information in the nature of a *quo warranto*, when brought on the relation of an individual to establish his right to an office, is regarded in the light of a civil remedy, for the determination of a civil right, and its sufficiency is to be determined by the rules applicable to pleadings in civil actions.

SAME.—*Sufficiency of Information.*—The information must contain such a plain statement of the facts which constitute the grounds of the relator's claim as to make it affirmatively appear that he has title to the office in controversy.

PLEADING.—*Ambiguity.—Demurrer.—Motion to Make Certain.*—Where a pleading contains a statement of all the facts essential to constitute a cause of action, although in general and ambiguous terms, it is good on demurrer, but may be made more certain on motion.

COUNTY COMMISSIONER.—*Term of.—Applies to Office, Not to Person.*—The

term of county commissioner applies to the office, and not to the person, and it ends with the expiration of each period of three years, regardless of the time when the officer commenced service in the term to which he was elected.

SAME. - *Confusion in Terms.—Act of 1885.*—J. was elected county commissioner in 1882. By reason of the encroachments of predecessors the term to which he was elected expired in November, 1883. S. was elected to the same term in 1884.

Held, that under the act of March 7th, 1885, S., as the commissioner-elect, was entitled to take possession and serve three years, and to the end of the regular term of the district.

SAME.—*Commissioner-Elect.—Who is.*—A commissioner who received a majority of the votes at an election held according to law is a commissioner-elect within the meaning of the act of 1885, whether he has received his certificate of election or not.

From the Delaware Circuit Court.

C. E. Shipley, R. S. Gregory and *A. C. Silverburg*, for appellant.

J. R. McMahan, T. F. Rose and *E. M. White*, for appellee.

MITCHELL, J.—This was a proceeding by the State, on the relation of Robert M. Snodgrass, challenging the right of Charles E. Jones to continue in the office of county commissioner for the first district in Delaware county.

A demurrer was overruled to the complaint or information, the material averments of which are that at the general election holden in November, 1884, the relator, an elector residing in the first commissioner's district of Delaware county, and eligible to the office of county commissioner, was duly elected, by receiving the highest number of votes cast at such election, to the office of county commissioner for the district mentioned.

It is averred that the relator was elected as the successor of the defendant, who was elected at the general election holden in 1882, and who took possession of the office on the 18th day of November, 1882, and whose term of office, it is alleged, expired on and prior to the 21st day of November, 1885, at which date the relator received his certificate of election and qualified according to law.

The information concludes with the averment that, although the relator has been ready and willing to enter upon the duties of the office, the defendant wrongfully and unlawfully usurps and intrudes into the same.

It is urged as an objection to the complaint that, instead of stating the facts upon which the relator bases his title, or which show that he is eligible to hold the office, the information merely states inferences and conclusions. There is much force in the objection.

The essentials of an information in a proceeding such as this are, that it contain such a plain statement of the facts which constitute the grounds of the relator's claim as makes it affirmatively appear that he has title to the office in controversy, so as to "show his interest in the matter." Sections 1133, 1134, R. S. 1881; *Reynolds* v. *State, ex rel.*, 61 Ind. 392.

While there is no essential fact omitted from the information under consideration, the facts are, nevertheless, stated in a manner entirely too general to furnish an example of good pleading. It is alleged therein that the relator was an elector of the county of Delaware, residing in the first district, and that he was eligible to the office of county commissioner. This averment shows the eligibility of the relator in such a manner as to leave no room for criticism in that regard. The statement of facts showing the grounds of his title is open to more serious objection. Since, however, the fact is stated that the relator received the highest number of votes cast at an election lawfully held in November, 1884, to fill the office in dispute, and that he was duly elected and qualified as the successor of the defendant, whose term had expired prior to November, 1885, we are constrained to hold that the information sufficiently shows the relator's title to withstand a demurrer. *Parmater* v. *State, ex rel.*, 102 Ind. 90.

An information in the nature of a *quo warranto*, when brought on the relation of an individual to establish his right to an office, is regarded in the light of a civil remedy, in-

voked for the determination of a civil right, and its sufficiency is to be determined by the rules applicable to pleadings in civil actions. High Extraordinary Remedies, section 710.

Where a pleading contains a statement of all the facts essential to constitute a cause of action, although such facts may be stated in general, indefinite or ambiguous terms, it is nevertheless good as against a demurrer, notwithstanding a motion to make more certain and specific might be entertained with propriety. *Louisville, etc., R. W. Co.* v. *Jones*, 108 Ind. 551, and cases cited.

The only other question made by the appellant relates to the ruling of the court in overruling a demurrer to the relator's reply to the defendant's answers.

It appears from the reply that the board of commissioners of Delaware county was originally organized in August, 1830, and that the first term of the commissioner for the first district ended in August, 1832. Taking the year 1832, therefore, as the initial point, and calculating periods of three years consecutively therefrom, and it necessarily follows, regardless of what confusion may have ensued meanwhile, that a regular term of the office of commissioner for the district in question expired in 1883. It appears from the reply that the holdings from 1875 and onward had been confused and irregular, and that when the defendant took possession of his term in November, 1882, his predecessor had already occupied two years of the term into which the defendant had been elected. As the term of county commissioner is fixed by law in such a manner that it applies to the office and not to the person, no amount of confusion in the holding can change the term, which expires with the expiration of each period of three years, regardless of the time when the officer commenced service in the term to which he was elected. *State, ex rel.*, v. *Barlow*, 103 Ind. 563; *Parmater* v. *State, ex rel., supra*, and cases cited.

The facts stated in the reply make it certain that the term into which the defendant was elected expired in November, 1883. His predecessor had occupied two years of the term before he was elected and admitted to possession. This, however, did not give the defendant title to the succeeding term, or authorize him to hold therein longer than until a successor for that term might be elected and qualified. The relator was properly elected as his successor in November, 1884, the current term being then vacant, except as the defendant occupied it under his right to hold over. When the act of March 7th, 1885, took effect, the defendant was a commissioner in office, whose term had expired, and whose successor was then elected. By the very terms of the act, the relator, as the commissioner-elect, was entitled to take possession of the term, and then "begin his service as commissioner" and "serve three years and to the end of the regular term of said district, and until his successor is elected and qualified," so as to restore the regular order. *Parcel* v. *State, ex rel.*, 110 Ind. 122; *State, ex rel.*, v. *Barlow, supra.*

The effect of the act above referred to was to give to commissioners holding at the time of its passage, whose terms had fallen into confusion and had been wrongfully encroached upon, and whose successors *had not then been elected*, the right to hold three years from the time they actually commenced service, and if that time expired, leaving a portion of a term, they were entitled to hold to the end thereof. So, also, commissioners *then elect*, who had been crowded out by encroachment, were entitled to take their terms, if that of the commissioner holding had expired, and they became entitled to hold three years from the time they might begin; and if that period expired, leaving a fraction, they were entitled to hold it out. In this way the original purpose of the law was to be practically restored.

A commissioner who received a majority of the votes at an election holden according to law is a "commissioner-elect"

within the meaning of the act of 1885, whether he had received his certificate of election or not.

The holding of the circuit court was consonant with the conclusions above, and was therefore not erroneous.

Judgment affirmed, with costs.

Filed Oct. 20, 1887.

119 198
115 494

112 198
159 204
159 205

No. 12,987.

MACKEY *v.* BALLOU.

DECEDENTS' ESTATES.—*Costs Taxed Against Administrator Personally.—When a Charge Against Estate.*—Where an administrator is sued in his individual capacity for the recovery of personal property of which he has taken possession in his representative capacity, believing it to belong to the decedent's estate, the costs which he incurs, in good faith, in defence of the suit, and which are taxed against him personally, are a proper charge against the estate.

SAME.—*Resisting Allowance.—Party in Interest.*—One who has purchased real estate which, there being no personal property, is liable to be sold by the administrator to make assets to pay an allowance, if it is a legal charge against the estate, has such an interest as gives him a right to contest its validity.

SAME.—*Estoppel.—Vendor and Purchaser.*—Neither the fact that his vendor is solvent, thereby giving him a remedy upon his covenant of warranty, nor that the vendor agreed to pay the claim for which the allowance is asked, prevents the purchaser from resisting the claim; but if the latter agreed with his vendor to pay it, and for that purpose retained a part of the purchase-money, he is estopped to dispute its validity.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

A. Steele and *R. T. St. John*, for appellee.

ZOLLARS, C. J.—In April, 1883, appellant filed a claim against himself as administrator of the estate of William Bailey, deceased. In his sworn statement accompanying the claim, he stated that it was for $216 costs, made and adjudged against him in an action by Peter Morton and his wife, Mary, to recover personal property which he had taken possession of, supposing and believing it to be property of the Bailey estate; that, at the time he took possession of the property, at the time the action was instituted by the Mortons, and at the time the judgment for costs was rendered against him, he was the administrator of the estate of Bailey, and that he was such administrator at the time he filed the claim; that the costs, instead of being adjudged against him personally, as they were, should have been adjudged and taxed against him as such administrator; that, in the defence of the action, he acted in good faith for the estate, in order to hold the property as a part of the estate.

At the following November term of the court, the claim thus filed was allowed against the estate.

At the same term, appellee filed a complaint or motion to have the allowance set aside and the claim rejected. In that, he stated under oath that in December, 1880, appellant, pretending to be the administrator of the estate of Bailey, wrongfully and unlawfully took possession of the personal estate with the pretence of administering it; that Bailey had devised all of his real estate to his wife for life, with remainder to Peter Morton and his wife, Mary, who was his, Bailey's, granddaughter; that, by a writing executed by Bailey, he had conveyed and transferred his personal estate to Peter and Mary Morton, making them the owners and entitled to the possession of the same; that appellant, having so unlawfully taken possession, refused to surrender the property to the Mortons; that they commenced and prosecuted an action against him for the recovery of the property, and were successful; that, by the issues in the case, the question was raised as to whether or not Bailey was of sound mind at the

time he made his will and executed the bill of sale of the personal property to the Mortons, and that that issue was determined in the affirmative, thus establishing the validity of those instruments; that the Mortons recovered a judgment for costs against appellant personally, and not against him in his capacity as administrator, nor against the estate; that in a subsequent motion in the case by appellant to have the costs taxed against the estate, which motion the court did not sustain, he stated under oath that the action was prosecuted against him personally, and not in his representative capacity, and that the costs were adjudged and taxed against him personally, and not in his representative capacity. After reciting the allowance against the estate, which he alleged was wrongfully procured, appellee further stated, in his complaint or motion, that there were no means out of which the claim, if allowed to stand as a charge upon the estate, could be paid, except the real estate, and that it had been sold, and for value conveyed to Addison Baldwin and William H. Irwin, and by them for value sold and conveyed to him, and that it was the purpose of appellant to institute proceedings for the sale of the real estate to make assets with which to pay the allowance.

To that complaint or motion by appellee, appellant filed an answer in four paragraphs, to all of which, except the third, which was a general denial, the court below sustained a demurrer.

The substance of the first paragraph is that Baldwin and Irwin purchased the real estate from the Mortons, and retained out of the purchase-price $216 to indemnify them against loss by reason of the costs so taxed against appellant; that they sold and, by a deed of warranty, conveyed the real estate to appellee, and that, they being persons of means, for any loss that he may suffer by reason of the allowed claim, he may recover upon that warranty; that appellee purchased the real estate with knowledge of the existence of the judgment for costs, with knowledge that the amount of those

costs could not be collected from the estate except by the sale of the real estate, and with knowledge of the retention of the money by Baldwin and Irwin.

The substance of the second paragraph is, that after the costs had accrued appellee purchased the real estate from Baldwin and Irwin, agreed with them to pay the costs, and for that purpose retained of the purchase-price the sum of $250.

The substance of the fourth paragraph is, that Baldwin and Irwin purchased the real estate from the Mortons after the costs had accrued, agreed with the Mortons to pay them, and for that purpose, with their consent, retained out of the purchase-price an amount equal to the costs; that at the time Baldwin and Irwin sold and conveyed the real estate to appellee, they agreed with him to pay the costs, and that they have not paid them.

Appellant insists that appellee does not show by his complaint or motion that he has any interest in the matter, in that he does not show that there is no personal property that may be reduced to money with which to pay the claim. The pleading in that respect, as in others, is not very specific or certain, but we think it sufficiently appears that the estate is without personal property. And having shown that there is no personal property, and that, therefore, it will be necessary for the administrator to sell the land to obtain money with which to pay the claim, if the allowance shall stand, and that he was threatening to do so, we think that appellee showed enough in that regard to give him the right to contest the claim in a proper manner.

The first paragraph of appellant's answer was not sufficient to withstand the demurrer directed against it. Appellee had the right, if he could, to protect his land from sale by the administrator for the payment of the claim; and that he had a right to do by defeating the claim. As bearing somewhat upon the question, see *Scherer* v. *Ingerman*, 110 Ind. 428.

So far as shown by the paragraph of answer under consideration, he was neither bound to pay the claim nor to allow his land to be sold for the payment of it, and afterwards prosecute an action against his grantors upon their warranty. Nor was he, under the averments in the fourth paragraph of answer, bound either to pay the claim or suffer his land to be sold, and rely upon the agreement of his vendors to pay the costs. There was, therefore, no error in the sustaining of the demurrer to the first and fourth paragraphs of answer.

We think the second paragraph of the answer was sufficient, and that the demurrer to it should have been overruled. It was there averred, as we have seen, not only that appellee agreed with his vendors to pay the costs, but that it was also agreed that such payment should be in the way of a part payment of the purchase-price of the land. Having made those agreements, we think he is estopped to dispute the validity of the claim. This conclusion is fully sustained by the case of *Hancock* v. *Fleming*, 103 Ind. 533 (535). For the error of the court below in sustaining the demurrer to the second paragraph of the answer the judgment must be reversed.

The evidence is not before us, and hence we can not know certainly why the court set aside the allowance and rejected the claim. It is not improper to say that, from the record before us, it is not apparent why the costs should not be allowed against the estate.

The statute provides that an administrator shall have full power to maintain any suit in his name as such administrator, for the recovery of possession of any property of the estate, and that he shall not be liable in his individual capacity for any costs in such suit. R. S. 1881, section 2291. See, also, *Evans* v. *Newland*, 34 Ind. 112; *Cavanaugh* v. *Toledo, etc., R. W. Co.*, 49 Ind. 149.

The spirit of the act requires, also, that the administrator shall not be held personally liable for costs which may accrue in a defence against claims of others to property which he

may have taken possession of as the property of the estate. Clearly, the administrator is not bound to abandon property upon every claim made to it by others. It is his duty to protect the property and preserve it for the estate by all proper means, including a proper defence in a litigation; and for the costs in such a defence he ought not to be made personally liable. Of course, it will be expected that in engaging in or conducting such defence he will exercise reasonable care and act in good faith. Here, neither want of reasonable care nor bad faith is charged upon the administrator. He took possession of the personal property, as he alleges, believing in good faith that it was property belonging to the estate.

Appellee seems to base his case solely upon the grounds that the Mortons prosecuted their action against appellant in his individual, and not in his representative, capacity, and that the costs in the action were adjudged and taxed against him in his individual, and not in his representative, capacity. An administrator has no way of compelling others, instituting actions of replevin against him for personal property, to institute them against him as administrator. And the fact that in such actions, instituted against him in his individual capacity, the costs may be taxed against him personally, would not seem to be a sufficient reason for not allowing them as a claim against the estate by the probate court. Such an allowance, doubtless, may be refused where there is bad faith or culpable negligence in the bringing of, or defending against, actions; but, as we have said, nothing of the sort is sufficiently charged here. By what we have said we are not to be understood as deciding or indicating an opinion that appellee's land must necessarily be sold to pay the claim, should it be allowed as against the estate, even though there be no personal property. That is a question not before us for decision.

The judgment is reversed, with costs, with instructions to

the court below to overrule the demurrer to the second paragraph of the answer, to grant leave to appellee to amend his complaint or motion, and to proceed with the case in accordance with this opinion.

Filed Nov. 2, 1887.

112	204
114	157
115	269
115	295
120	583
112	204
147	634
112	204
164	327

No. 13,004.

The Phenix Insurance Company v. Burdett.

Foreign Insurance Companies.—*Right to do Business in this State.—Legislative Regulation.*—A State Legislature has authority to prescribe the terms upon which foreign insurance companies may transact business within the State.

Same.—*Duty of Agents to Retain Money.—Constitutionality of Statute.*—Section 4 of the act of December 21st, 1865 (section 3768, R. S. 1881), requiring the agents of foreign insurance companies, when losses occur, to retain moneys of such corporations coming into their possession until the losses are adjusted, or to abide the event of a suit, is constitutional.

From the Fountain Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

Elliott, J.—There is but one question presented by this record. That question is, however, an important one, as it involves, in a general way, the validity of our statutes governing foreign insurance corporations, and especially the fourth section of the act of December 21st, 1865.

It may now be regarded as settled that a State Legislature has authority to prescribe the terms upon which foreign insurance companies may transact business within the State. In *Paul* v. *Virginia*, 8 Wall. 168, the court in discussing the

general subject said, with reference to insurance corporations: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."

In *Ducat* v. *Chicago*, 10 Wall. 410, and *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, this doctrine is reaffirmed. It had, indeed, been long before explicitly asserted. *La Fayette Ins. Co.* v. *French*, 18 How. 404. In three, at least, of the State courts this principle has been asserted and held to sustain what are commonly called the retaliatory laws. *Goldsmith* v. *Home Ins. Co.*, 62 Ga. 379; *Phœnix Ins. Co.* v. *Welch*, 29 Kan. 672; *People* v. *Fire Ass'n*, 92 N. Y. 311 (44 Am. Rep. 380).

In many other cases the laws have been assumed to be valid without discussion. *Insurance Co.* v. *Brim*, 111 Ind. 281; *Granite State, etc., Ass'n* v. *Porter*, 58 Vt. 581; *Ohio* v. *Moore*, 39 Ohio St. 486; *State* v. *New York L. Ins. Co.*, 81 Mo. 89; *State* v. *Farmers' Ins. Co.*, 15 Ins. L. J. 381; *Ehrman* v. *Teutonia Ins. Co.*, 1 McCrary C. C. 126; *Mutual Benefit L. Ins. Co.* v. *Bales*, 92 Pa. St. 352.

There can, therefore, be no question as to the general right of the Legislature to impose restrictions upon foreign insurance companies, and the only question here is as to the validity of the particular restriction contained in the act of December, 1865. The section of which we are speaking reads thus: "Whenever any loss shall occur of any property insured by any company authorized to take risks under this act, it shall be the duty of the agent by whom the insurance was made, to retain in his possession all moneys belonging

to such company, which may then be or may thereafter come into his possession, until such loss is adjusted and paid: *Provided*, That if suit shall be commenced by the party insured, against such company, the agent may deposit in court double the amount mentioned in the policy, to abide the event of the suit; or if the party insured shall not commence suit within ninety days after the agent shall have given written notice to such party that the loss will not be paid, the agent may thereafter pay over to persons entitled, the moneys of said company; and if any person insured by such company, meeting with a loss, shall notify any other agent of such company thereof, it shall be the duty of such agent to retain all moneys belonging to such company, which may then be, or may thereafter come into his possession, as hereinbefore required of the agent with whom the insurance was effected." Section 3768, R. S. 1881.

With the question of the expediency or policy of this statute, the courts have nothing to do; that is, as has been again and again decided, purely a legislative question. *Eastman* v. *State*, 109 Ind. 278. The statute must stand, unless it is plainly in conflict with some constitutional provision; for if there is doubt as to its constitutionality, the doubt must be resolved in favor of the Legislature. *Robinson* v. *Schenck*, 102 Ind. 307.

We regard the provisions of the statute as an exercise of the authority to require security for the citizens who insure in foreign companies. *Paul* v. *Virginia*, *supra*. The statute does not take the property of the corporation, but simply requires that it shall be held to abide the event of a suit or for a limited time. There is no taking without process of law. It is true the money may be bound up until a judicial decision is rendered; but, as is shown by the cases to which we have referred, this is a restriction which the Legislature may impose upon foreign corporations who do business within the State. Whether it is wise to do this or not, or whether it is or is not unjust, are questions for the Legislature, not for the

courts. The courts can not interfere unless there is a violation of some constitutional provision prohibiting the enactment of such a statute. *Beauchamp* v. *State*, 6 Blackf. 299; *Hedderich* v. *State*, 101 Ind. 564 (51 Am. R. 768), and cases cited; Cooley Const. Lim. (5th ed.) 201.

There can be no doubt, under the authorities, that the Legislature may require a deposit as a condition precedent to the right to do business, and nothing more is done by the statute under examination than to require an increase in the security when a loss actually occurs. This, it is obvious, is but an extension of the settled principle.

The cases of *Ames* v. *Port Huron, etc., Co.*, 11 Mich. 139, *Rockwell* v. *Nearing*, 35 N. Y. 302, and *McRae* v. *Hogan*, 39 Wis. 529, are not in point, because the statute does not profess to authorize the taking of any property; it simply requires that money shall be held until a judicial decision can be had. It does not, indeed, deprive the company of the possession of the money, for the possession of the agent is the possession of the principal.

Judgment affirmed.

Filed Nov. 2, 1887.

112 207
116 396
117 409

112 207
139 135

112 207
143 57

112 207
144 454

112 207
160 240

112 207
167 501

No. 12,958.

MEEKER ET AL. *v.* SHANKS ET AL.

PROMISSORY NOTE.—*Set-Off Against Assignor.—Reply by Assignee.—Sufficiency of.*—In a suit by the assignee, after maturity, of a promissory note, it is a good reply to an answer of set-off by the maker against the assignor, that the maker is indebted to such assignor in a sum in excess of that claimed as a set-off.

SAME.—*Legal Inception.—Delivery to Person Other than Payee.*—It is not essential to the legal existence of a promissory note that it should have been delivered to the person named therein as payee.

Meeker *et al.* v. Shanks *et al.*

SAME.—*Sureties.—Inquiry.—Fraud.—Consideration.*—If paper is signed for a special purpose in which the sureties are interested, the fact that it is made payable to a particular person may be sufficient to put another who takes it upon inquiry; and if to take it will operate as an injury or fraud upon the sureties, they may defend against it for want of consideration.

SAME.—*Accommodation Makers.—Perversion of Paper.*—Where mere accommodation makers, having no interest beyond the accommodation of their principal, either in the mode of raising the money or in the manner in which it is to be applied, sign a promissory note made payable to a named person, the fact that without their consent the note is delivered to another, without any alteration, who advances the money upon it, does not constitute such a perversion of the paper as will defeat it in the hands of a holder for value.

SPECIAL FINDING.—*Silence as to Material Facts.—Presumption.*—Where the special finding is silent in respect to certain material facts, it will be presumed that they were found against the party upon whom the burden of proving them rested.

From the Jay Circuit Court.

D. T. Taylor, T. Bailey, W. H. Williamson, W. C. Ladd and *R. H. Hartford*, for appellants.

J. R. Perdieu, J. P. C. Shanks, J. M. C. Shanks and *C. M. C. Shanks*, for appellees.

MITCHELL, J.—The complaint in this case alleges "that the defendants, by their joint and several promissory note, on the 31st day of December, 1881, ninety days after date, promised to pay to the order of James B. Jaqua, at the Citizens' Bank, the sum of two hundred and fifty dollars," and that Jaqua subsequently endorsed the note to the plaintiffs. A copy of the note, which appears to have been signed by the defendants, is made an exhibit with the complaint.

This was a sufficient averment of the execution of the note by the defendants, and the appellants' objection that the complaint does not allege that they executed the note is, therefore, not well taken.

The suit was against Meeker and four others. Meeker answered that he signed the note as principal, and that his co-defendants signed as sureties. He averred that, although the

note was made payable on its face to Jaqua, it had never been delivered to him, but that, after being signed by all the defendants, it was left in the possession of Meeker, who obtained the amount of money therein stipulated from one Mason, to whom he delivered the note, and that the latter transferred it by delivery to the plaintiffs long after its maturity. The answer alleges further, that while Mason held and owned the note, he became indebted to Meeker for goods sold and delivered, to the amount of five hundred dollars. Prayer that the indebtedness from Mason to Meeker be allowed as a set-off against the note.

The plaintiffs replied, that Meeker was indebted to Mason, on account, in a sum largely in excess of the amount claimed by the former as a set-off.

The appellants contend that the reply was insufficient because it did not confess and avoid that part of Meeker's answer which alleged that the note had never been delivered to Jaqua, and that, in consequence, it never had a legal inception as a note until it was negotiated to Mason.

There is no merit in this objection. So much of the answer as related to the manner in which the note had its inception was pleaded merely by way of inducement, in order to show that Meeker occupied such a relation to Mason, the real payee, as entitled him to set off the indebtedness due him from the latter. The plaintiffs, in effect, admitted that the note had its inception as claimed in the answer, but they replied that, instead of their assignor, Mason, being indebted to Meeker, the latter was indebted to Mason. This made their replication complete. *Dodge* v. *Dunham*, 41 Ind. 186.

The court found specially that the defendants signed the note and left it in the possession of Meeker. The latter, instead of delivering the note to Jaqua, to whom it was made payable, obtained the money from, and delivered the note, without any alteration, to Mason. After the note matured, Mason transferred it, by delivery, to the plaintiffs for a val-

uable consideration. After it had been thus transferred, Jaqua, without any previous knowledge of or interest in the transaction, endorsed the note so as to vest the title in the plaintiffs. In respect to the set-off, the court found that Meeker was indebted to Mason, and its conclusion was that the plaintiffs were entitled to recover against all the defendants.

It is now contended, on behalf of all the appellants, that, because the note never was delivered to Jaqua, to whom it was made payable, it never had a legal inception, nor became available as a promissory note. Moreover, the sureties argue that, even if the note became legally operative as between the principal and Mason, they are not liable, because the delivery of it to Mason, without their consent, was such a perversion of the paper as worked a fraud upon them.

It may be conceded that, as a general rule, a promissory note, like any other written contract, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intent of the parties. *Burson* v. *Huntington*, 21 Mich. 416; *Chipman* v. *Tucker*, 38 Wis. 43; *Cline* v. *Guthrie*, 42 Ind. 227 (13 Am. R. 357).

It is not, however, essential to the legal inception of a promissory note that it should have been delivered to the person named therein as payee. Thus, in *Rhyan* v. *Dunnigan*, 76 Ind. 178, the defendants made their note payable to one Humble, to whom it was presented by one of the makers. Humble refused to accept it, and the note was afterwards delivered, with the consent of all the makers, to Dunnigan, who advanced the money on it; held, that in legal effect the transaction constituted the paper a promissory note, payable to Dunnigan by the name of Humble. While the note in suit remained in the hands of Meeker it had no legal existence as a promissory note. As soon, however, as Mason advanced the money upon it, and took it as evidence of the debt, the note took its inception, and became operative as a valid security for a loan of money. *Bank of Chenango* v.

Hyde, 4 Cow. 567; 2 Daniel Neg. Instr., section 1190.

The plaintiffs could have maintained an action upon it, without the endorsement of Jaqua, by alleging and proving the facts. *Leaphardt* v. *Sloan*, 5 Blackf. 278; *McKinney* v. *Harter*, 7 Blackf. 385.

This disposes of the case so far as Meeker, the principal, is concerned. Concerning the sureties, it may be said the facts leave it plainly to be inferred that they signed the paper and left it in the hands of Meeker, intending thereby to enable him to raise money upon it for his use. This made them accommodation makers. True, the sureties supposed and intended that the money would be obtained from Jaqua, to whom the note was made payable; but it does not appear that they had any interest, either personal or pecuniary, that the money should be obtained from Jaqua rather than from Mason. They are, therefore, within the rule that an accommodation maker, who has no other interest to subserve in siguing paper for another, except to enable the person for whose accommodation the paper is signed to obtain the money, can not complain that the paper was diverted, so long as nothing more is done than to make it available for the very purpose for which it was signed.

That accommodation paper is made payable to a particular person does not, without more, prevent the person to whom it is entrusted, and for whose accommodation it was made, from obtaining the money from another. Unless the sureties have some interest beyond the mere accommodation of their principal, any person may assume that it is an accommodation to the makers of the paper to advance the amount of money which it calls for. Accordingly, where an accommodation note was signed by a surety, and made payable to the president and directors of the Rutland bank, the bank having refused to discount the paper, it was held that it was not perverted by being delivered to a third person as collateral security, the court saying, in substance, that it was immaterial to the surety who advanced the money, so that the per-

son for whose accommodation he signed obtained the benefit of it. *Bank of Rutland* v. *Buck*, 5 Wend. 66; *Reed* v. *Trentman*, 53 Ind. 438; *Fetters* v. *Muncie Nat'l Bank*, 34 Ind. 251 (7 Am. R. 225).

The rule seems to be, that if the paper has accomplished substantially the purpose contemplated in the accommodation, that is enough to entitle a holder for value to recover.

Where, therefore, as in this case, it does not appear that the makers had any pecuniary interest in the particular use that was to be made of their names, or in the manner in which the paper was to be applied, or in the mode or plan of raising the money, it is immaterial that the paper has not been used in exact conformity with the original design. *Lord* v. *Ocean Bank*, 20 Pa. St. 384; *Arnold* v. *Campbell*, 18 Cent. L. J. 289; 1 Daniel Neg. Instr., section 792.

If the paper was signed for a special purpose in which the sureties were interested, the fact that it is made payable to a particular person may be sufficient to put another who takes it upon inquiry; and if to take it would operate as an injury to or fraud upon the sureties, the latter may defend against it for want of consideration. *Armstrong* v. *Cook*, 30 Ind. 22; *Johnston* v. *May*, 76 Ind. 293; *Heeg* v. *Weigand*, 33 Ind. 289; *Jeffries* v. *Lamb*, 73 Ind. 202.

There is nothing in the findings to show that there was any fraudulent perversion of the paper in this case.

The appellants complain that the special finding is silent in respect to some material facts which were in issue. So it is, but they were issues in respect to which the appellants had the burden. The presumption, therefore, is that upon those issues the court found against them. *Mitchell* v. *Colglazier*, 106 Ind. 464; *Stix* v. *Sadler*, 109 Ind. 254. There was, hence, no ground for a *venire de novo*.

The judgment is affirmed, with costs.

Filed Nov. 1, 1887.

No. 12,909.

WARREN ET AL. *v.* SOHN ET AL.

MINES.—*Priority of Liens for Labor and Royalty.—Constitutionality of Statute Giving.*—Section 5471, R. S. 1881, giving miners and other persons employed in and about coal mines a prior lien on the mining property for work and labor, and land-owners a prior lien for royalty, is not in conflict with any provision of the Constitution of this State or of the United States.

SAME.—*Mortgage of Mining Property.—Rights of Mortgagee.—Notice.*—The provisions of section 5471, *supra*, enter into and become a part of mortgages executed upon coal mining property, and the mortgagees acquire liens subject to such statutory liens as may thereafter attach for work and labor performed and for royalty, and with notice that the latter liens will be prior and paramount.

SPECIAL FINDING.—*Exception to Conclusions of Law.—Admission as to Facts.*—An exception merely to the conclusions of law upon a special finding of facts admits that the facts have been correctly found.

From the Vanderburgh Superior Court.

P. Maier, J. S. Buchanan, C. Buchanan and *S. B. Vance*, for appellants.

A. C. Tanner, W. W. Ireland, R. C. Wilkinson and *W. H. Gudgel*, for appellees.

HOWK, J.—The only error whereon the appellants, defendants below, rely for the reversal of the judgment or decree herein is, that the trial court erred in its conclusions of law upon its special finding of facts.

The facts specially found by the court were substantially as follows:

1. At the times hereinafter mentioned, the "Evansville Echo Mining Company" was a corporation organized pursuant to the laws of Indiana, owning and operating a coal mine in Vanderburgh county, Indiana.

2. On the first day of December, 1883, said mining company executed a mortgage to William Warren, trustee, on the property described in said Warren's cross complaint

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herein as follows, to wit: All the right, title and interest of said company in a certain leasehold, created by virtue of a lease executed by Herman Wessel on the 27th day of November, 1883, and recorded in lease-record No. 3, pages 352, 353 and 354, of Vanderburgh county, Indiana, as follows, to wit: Lots numbers 27 and 28 of Maxwell's subdivision of the south half of section 17, and the southeast quarter of the southeast quarter of section 18, township 6 south, range 10 west, Vanderburgh county, Indiana; also, the surface of two acres of said lot No. 27, for the shaft and improvements erected and to be erected thereon, said two acres being more particularly described as follows: (Description omitted). Also, all engines, boilers, machinery, tools, appliances, apparatus, buildings and fixtures on said leasehold, and all coal-cars, wagons, horses, mules, rights, credits, franchises and property of every kind and nature, held and owned by said company, to secure the payment of 100 bonds of $100 each, payable ten years from their date, with eight per cent. interest payable semi-anuually, and coupons were attached for such interest, all payable at the First National Bank of Evansville. By the terms of said bonds, it was provided that, if the interest was not paid when due, then the principal should become due and payable. Said coupons falling due December 1st, 1885, are due and unpaid, although payment thereof has been duly demanded, and the principal thereof remains wholly unpaid. Said bonds are owned and held as follows: Adam Schmidt and Herman Rehrman, each 20 bonds; Herman Wessel and Margaret Mane, each 8 bonds; Koester and Korff, 38 bonds; and John Toranelle, 6 bonds.

3. On the 1st day of May, 1885, said mining company executed a second mortgage on the same property hereinbefore described to Koester and Korff to secure the payment of a promissory note of that date, for the sum of $6,738, executed by said company and made payable to the order of said Koester and Korff one year after date, with seven per cent interest payable semi-annually, and, if not paid within

thirty days after due, the principal to become due and payable, the amount of the note to bear interest from April 1st, 1885, waiving relief from valuation or appraisement laws, and providing for attorneys' fees. Said note and the interest payable December 1st, 1885, remain due and wholly unpaid, amounting, principal and interest, to the sum of $7,052, and $352 as an attorney's fee, the total sum being $7,404.

4. On the 9th day of July, 1885, Clara Weigel purchased for a valuable consideration and became the owner of 100 shares of the capital stock of said mining company, and remains at this time the owner and holder thereof. This finding shall in no wise prejudice the right of said Clara Weigel in any litigation which may hereafter arise between her and Koester and Korff, or their assigns.

5. During the months of October and November, 1885, the following named miners and other persons, employed and working in and about the coal mine, performed work and labor in and about the mine of said company, situate on the real estate hereinbefore described, and duly filed, in the proper office, notice of their intention to hold a lien for the several amounts due them, and performed all the acts required by section 5471, R. S. 1881, to acquire a lien on the mine, machinery, fixtures, etc., of said mine, for the payment of said amounts due them as aforesaid. No part of said amounts has been paid; and the names and amounts due are as follows, to wit: Benjamin Sohn, $76.50. (Here follow the names of forty-six other persons, which, with the sums set opposite their respective names, varying in amount from $101 to $1.03, we omit.)

6. The following persons performed work and labor, in and about said mine, of the following kind, to wit: By hauling coal from said coal mine to consumers thereof in the neighborhood, part of them using wagons belonging to said mining company, but all of them using their own horses to draw the same; said labor was performed within two months, and due notice of intention to hold lien was filed in the

proper office, and said debts remain unpaid, as follows: John Stotefer, $12.82; Henry Korff, $20.49; John C. Stubbs, $26.25, and John Hitch, $12.75.

7. Kratz Bros. performed work and labor, in and about said mine, of the following kind, to wit: They removed a pump from said mine and made repairs thereto at their foundry, and replaced and fastened the pump so repaired into the mine, for which there is due them the sum of $109.70; and said repairs were made within two months, and for the same they gave due notice of their intention to hold a lien, and recorded the same in the proper office, under the statute mentioned.

8. The following persons were the owners of the land from and under which said mining company took out coal within two months, and gave notice of their intention to hold a lien therefor, and procured the same to be duly recorded in the proper office, and the royalty due the said parties, which remains wholly unpaid, is as follows: Henry Wessel, $47.34, and Clara Weigel, $74.96.

9. Ten per cent. is a reasonable attorney's fee due said claimants for the several claims described in the *fifth*, *sixth*, *seventh* and *eighth* findings above written.

Upon the foregoing facts, the court stated its conclusions of law as follows:

"1. Benjamin Sohn and the persons described in the *fifth*, *sixth* and *seventh* findings of fact, as above, have and hold the first and paramount lien on the said coal mine, and all machinery and fixtures connected therewith, including scales, coal bank cars and everything used in and about said mine.

"2. The owners of the land described in the *eighth* finding of fact, as above, have a lien on the same property for the amounts due them as therein mentioned, but said lien is inferior to the claims of Benjamin Sohn *et al.*

"3. The persons described as bond holders, in the *second* finding of facts, are entitled to a lien on the mortgaged property for the payment of their debts, but the said lien is sub-

ject and inferior to the lien of the mining and royalty claims above described.

"4. The mortgagees Koester and Korff are entitled to a lien on the mortgaged property for the mortgage debt above described in the *third* finding of facts, but the said lien is subject and inferior to the lien of said bond holders, above mentioned.

"5. And the court further finds, that all the said lien holders are entitled to personal judgments against the said mining company for the amounts due them, and to a sale of the property above described, as subject to their liens, for the satisfaction of their claims, the proceeds of the sale, after the payment of the costs of sale and of these actions, to be applied to said debts in the order declared herein.

(Signed) "AZRO DYER, Judge."

Over appellants' exceptions to its conclusions of law, the court rendered its final judgment and decree thereon and in accordance therewith. This appeal is jointly prosecuted, and errors are jointly assigned here, by Warren, trustee, by the holders of the bonds issued by the mining company, and by the junior mortgage creditors, Koester and Korff.

It is manifest, we think, from the conclusions of law herein, that they are and must be rested upon the trial court's construction of the provisions of section 5471, *supra*, in force since May 1st, 1879. This section, so far as applicable to the case now under consideration, reads as follows:

"In all coal mines in this State, the miners and other persons employed and working in and about the mines, and the owners of the land and others interested in the rental or royalty on the coal mined therein, shall have a lien on said mine and all machinery and fixtures connected therewith, including scales, coal bank cars, and everything used in and about the mine, for work and labor performed within two months, and the owner of the land, for royalty on coal taken out from under his land, for any length of time not exceeding two months; and such liens shall be paramount to and

have priority over all other liens, except the lien of the State for taxes; and such liens shall have priority, as against each other, in the order in which they accrued, and for labor over that for royalty on coal."

The trial court's conclusions of law, upon the facts specially found herein, it will be observed, are in strict harmony with the exact letter of the statutory provisions above quoted; and, therefore, there can be no error in such conclusions of law, unless it can be correctly said that such statutory provisions contravene the fundamental laws of the land, Federal or State, and are unconstitutional, invalid and void. Appellants are in no condition to call in question here any of the facts specially found by the court; for it is settled by all our decisions that, by their exception to the conclusions of law and the error predicated thereon, they admit that the facts of the case have been fully and correctly found by the court. *Robinson* v. *Snyder*, 74 Ind. 110; *Fairbanks* v. *Meyers*, 98 Ind. 92; *Bass* v. *Elliott*, 105 Ind. 517; *Wynn* v. *Troy*, 109 Ind. 250.

It will be observed further, that there is no controversy here between the labor creditors and the royalty creditors of the mining company, as against each other, upon the question of the priority of their respective liens. All these creditors are content, so far as the record shows, with the court's conclusions of law, or, at least, they make no complaint here of any of such conclusions. Appellants, as we have seen, were mortgage creditors of the mining company, and the liens of their mortgages upon its mining property, as found by the court, attached thereto some time before and were in force at the time the statutory liens of the appellees, for their labor or royalty, as found by the court, had attached to such property. It is contended by appellants' counsel, that to interpret, construe and apply the statutory provisions above quoted, according to their literal import, to the matters in controversy herein, as the trial court manifestly did, was clearly erroneous, in that the action and decision of the

court in the premises resulted in divesting the mortgage liens of the appellants which ought to have been allowed priority over the statutory liens of appellees, under the facts and circumstances of this case as found by the court. Counsel claim that the mortgage creditors in this case have liens upon the property of the mining corporation older than, and prior in point of right and equity to, the statutory liens of appellees, for labor or royalty, upon such property, which accrued and attached thereto subsequently to the execution of the mortgages to the appellants herein.

It is a mistake in the use of words, we think, to say that the trial court's conclusions of law herein, in favor of appellees, divested the mortgage liens of the appellants. On the contrary, it may be fairly said that appellants acquired their mortgage liens on the property of the mining company with knowledge of the uses and purposes to which such property was applied by its corporate owner, and with notice that, under the statutory provisions above quoted, the mortgaged property was liable to be subjected to after-acquired liens for labor or royalty, which liens would be "paramount to and have priority over" their mortgage liens. The corporate name of the mortgagor, and the character and description of the mortgaged property, were such as clearly indicated to the mortgagees, and those claiming under them, that such property was intended to be used, and could only be used by its owner, in its coal mines in this State, for the purposes of mining coal. The mortgage to Warren, trustee, under which the bond holders claimed, and the mortgage to Koester and Korff were both executed by the mining corporation, as shown by the court's special finding of facts, more than four years after the statutory provisions above quoted took effect and were in force. Under repeated decisions of this court it must be held, therefore, that these statutory provisions entered into and formed a part of such mortgages, and that appellants acquired their mortgage liens on the mortgaged property subject to such statutory liens as

might thereafter, in the vicissitudes of the mortgagor's business, attach to such property for work and labor performed, or for royalty, and with notice that the latter liens would, under the statute, "be paramount to and have priority over" their mortgage liens. *Bryson* v. *McCreary*, 102 Ind. 1; *Edwards* v. *Johnson*, 105 Ind. 594; *Long* v. *Straus*, 107 Ind. 94; *Owen School Tp.* v. *Hay*, 107 Ind. 351.

Appellants' counsel claim that the statutory provisions heretofore quoted are in conflict with section 23 of article 1 of our State Constitution, which declares that "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Section 68, R. S. 1881. Counsel further claim that such statutory provisions contravene so much of section 1 of article 14 of the Federal Constitution as declares in effect that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Section 39, R. S. 1881. We can not see, however, that the statutory provisions quoted are in conflict with either one of the declarations of our fundamental laws, State or Federal, cited and relied upon by appellants' counsel. Certainly it can not be said, with any degree of legal accuracy, that these statutory provisions deny to any person within the jurisdiction of this State, in any manner or to any extent, the equal protection of the laws. Nor can it be correctly said, we think, that the General Assembly, in or by the enactment of such statutory provisions, has granted to any citizen, or class of citizens, privileges or immunities which, upon the same terms, do not equally belong to all citizens. We do not doubt that if appellants, or any one or more of them, had performed work and labor in and about the mortgagor's coal mines, they might have acquired liens, under the statutory provisions quoted, in the same manner and upon the same terms as the appellees acquired their liens, and of equal priority therewith. As applied to the facts of this case, as found by the trial court, we are of opinion that

the statutory provisions above quoted are not repugnant to or in conflict with any provision of our fundamental laws, State or Federal, and are a constitutional and valid expression of the legislative will upon the subject-matter of such statutory provisions.

As we have already said, the trial court manifestly rested its conclusions of law upon these statutory provisions according to their literal import; and in this, we think, upon the facts of this case as specially found by the court, there was no error. Whether the facts of the case were, or were not, correctly found by the trial court, are questions not presented by the record now before us, and, therefore, they are not considered. We have found no error in such record which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Nov. 3, 1887.

No. 12,962.

Harman et al. v. Moore et al.

Contract.—*For Delivery of Personal Property.—Action for Breach.—Complaint.—Averment that Debt is Due and Unpaid.*—Where a contract requires the delivery of personal property, a complaint thereon alleging a demand for the property and a refusal to deliver it, whereby the defendant has become indebted to the plaintiff in a named sum, sufficiently states a cause of action for the breach of the contract, without averring that the debt remains due and unpaid.

Same.—*Lease.—Precedent Conditions.—Averment of Performance.*—A complaint against a lessee, to recover for a breach of the contract, need not allege that the lessor has performed on his part, where it appears that, by the terms of the lease, the right of action does not depend upon any precedent conditions to be performed by him.

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Harman *et al.* v. Moore *et al.*

JUDGMENT.—*Review of.*—*Jurisdiction of Person.*—*Appearance.*—*Complaint.*—A complaint to review a judgment, on the ground that the court acquired no jurisdiction over the person of the defendant, is bad if the record shows an appearance by or for the defendant.

SAME.—*Proceeding by Party to Set Aside.*—*Collateral Attack.*—*Matters Dehors the Record.*—Where the record of a court of general jurisdiction, either affirmatively or by the presumptions which attach to it, shows that a judgment has been rendered against a party over whom the court had acquired jurisdiction, any attack, the sole purpose of which is to have the judgment declared void, by showing matters *dehors* the record, is a collateral attack and can not be made by a party to the judgment.

SAME.—*Jurisdiction.*—*Unauthorized Appearance.*—Where the record shows that the court acquired jurisdiction over the person of the defendant by an appearance and answer, the mere fact the latter signed the paper purporting to be an answer out of court and left it in the possession of the plaintiff's attorney, who filed it in his absence, wherefore it is alleged that the judgment is void for want of jurisdiction, does not entitle him to have the judgment set aside.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellants.

C. V. McAdams and *T. C. Moore*, for appellees.

MITCHELL, J.—The first paragraph of the complaint in this case is in the nature of a bill to review the proceedings and judgment of the Warren Circuit Court, had and rendered in an action wherein the appellees, as executors of the last will and testament of Jacob Harman, deceased, recovered a judgment against the appellants for seven thousand dollars and upward. This paragraph seeks a review on the ground that there is error of law apparent upon the face of the record, in that the complaint did not state facts sufficient to constitute a cause of action, and upon the further ground that the court did not have jurisdiction over the persons of the defendants.

The second paragraph seeks to set aside the judgment and declare it void for the want of jurisdiction over the persons of the defendants, on account of which the plaintiffs say the proceedings and judgment ought to be reversed and set aside. A complete transcript of the pleadings, proceedings and

judgment thus brought in question is exhibited with, and made a part of, each paragraph of the complaint.

The original action is founded upon a lease, by the terms of which Jacob Harman, in his lifetime, demised, for a certain rent therein reserved, various tracts of land, aggregating over one thousand acres, situate in Warren county, to Anthony Harman for a term of twelve years from the 15th day of March, 1867. The lease contained a recital to the effect that the lessor had theretofore furnished to the lessee certain personal property, which was specifically described, enumerated and valued, and which aggregated in value ten thousand dollars, and consisted of horses, mules, oxen, cattle, sheep, farming implements, farm products and provisions. It was stipulated in the lease that the lessee should be entitled to the increase, growth, gain and proceeds arising from the personal property so furnished, and that, at the end of his term, he should surrender the demised premises, and deliver to the lessor or his assigns, on the premises demised, horses and other personal property, in kind and value, equal to that furnished him by the lessor. The lease was extended in 1876, and again in 1882, the last extension being for a term ending March 15th, 1885. At the time of the last extension, John J. and Waldo L. Harman became jointly interested with the original lessee by becoming parties to the lease. The complaint alleged that the lessor died in February, 1885, and that the plaintiffs had been appointed the executors of his last will. The execution of the lease and the several extensions were set forth, together with copies of the several instruments and the consideration and terms upon which the demise was made. The plaintiffs assigned as a breach of the lease, that, subsequent to the 15th day of March, 1885, that being the date of the alleged expiration of the term, as last extended, they, plaintiffs, demanded of the defendants, on the lands described in the lease, the return of personal property of like kind and worth as that set forth in the lease, less the amount of certain legacies be-

queathed to the defendants by the last will of the lessor, but that the defendants refused to deliver any property in compliance with the demand. The complaint further alleges that, by reason of the premises, the defendants are indebted to the plaintiffs as the executors of the last will and testament of Jacob Harman, deceased, in the sum of seven thousand dollars and upward.

The first objection taken to the complaint is, that it nowhere alleges that the defendants are indebted to the plaintiffs, or that the debt remains due and unpaid. This objection is not well taken.

The right of action did not arise from the failure of the defendants to pay money upon a contract. The lease did not require the lessees to pay money, but, in respect to the breach alleged, it required them, at the expiration of the term, to deliver personal property of like kind and value as that delivered to the lessees by the lessor prior to the execution of the lease.

As the breach complained of did not arise from a failure to pay money, but because the defendants refused to deliver property as their contract required, there would have been no propriety in averring that a debt remained due and unpaid. It sufficiently appeared from the complaint that the term had expired, that the plaintiffs were the executors of the last will of the deceased lessor, and had demanded the property on the land leased, and that the defendants had refused compliance with the demand, and that they had thereby become indebted in a sum named.

It is quite true "that a pleading founded on a contract is never complete, either in form or substance, unless it alleges a breach" (*Lawson* v. *Sherra*, 21 Ind. 363); but it is also true that where a contract requires the delivery of personal property, a complaint on such contract, which alleges a demand for the property, and that the defendants refused to deliver it, and that in consequence of such refusal the plaintiff has sustained damage, sufficiently states a cause of action

for a breach of the contract. *Catterlin* v. *Armstrong*, 101 Ind. 258, and cases cited.

It is objected that the complaint does not show that the demand was made after the expiration of the lease and before suit brought, or that it was made by the plaintiffs as executors, or that it was made upon the farm leased. The complaint alleges that the plaintiffs, after the 15th day of April, 1885, "have demanded of said defendants, on the lands described in said lease, the return of personal property of like value and worth of that set forth in said lease, sufficient to satisfy said lease."

It is a necessary deduction from this averment that the demand must have been made after the expiration of the term and before the filing of the complaint, and that in making the demand the plaintiffs were acting in the character of executors, and that it was otherwise made in compliance with the requirements of the lease. It was not necessary that the complaint should have alleged that the lessor had performed all the conditions to be performed on his part, for the reason that by the terms of the lease there were no precedent conditions to be performed by him upon which the right of action depended. There was nothing for the lessor to do in respect to the personal property, which the lease recites had, at the date thereof, been delivered to the lessee by the lessor, except to receive other property of like kind and value at the end of the term. We can discover no ground upon which it can be held that the complaint was insufficient.

So far as the first paragraph seeks a review of the judgment on the ground that the court had no jurisdiction over the persons of the defendants, it is only necessary to say that the record exhibited with the complaint shows that the defendants appeared in person to the action. In this state of the record no ground for review for apparent want of jurisdiction is presented. A complaint to review a judgment on the ground that the court acquired no jurisdiction over the

persons of the defendants is bad, if the record shows an appearance by or for the defendants. *Bush* v. *Bush*, 46 Ind. 70.

In respect to the second paragraph of the complaint, it is contended that, because it is averred therein that no summons had been issued or served upon the defendants in the original action, and that they did not appear either in person or by attorney, the conclusion follows that the complaint makes it appear that the court acquired no jurisdiction over the persons of the appellants, and hence that the judgment was void.

This paragraph avers, and the proceedings in the original cause show, that the record of that cause is silent upon the subject of the issuing or service of process upon the defendants.

The record entry in that cause does show, however, that the defendants appeared in person and filed an answer to the complaint, in which they admitted all the allegations therein contained.

The complaint seeks to avoid the force and effect of the record by averring that, notwithstanding its silence as to the issuing and service of process, and the entry thereon that the defendants appeared in court and filed their answer, they did not appear in fact, and that no process was in fact issued or served.

The complaint charges that the defendants signed the paper purporting to be an answer out of court, leaving it in the possession of the plaintiffs' attorney, who, it is averred, filed it in their absence and caused the entry hereinbefore referred to to be made.

It is to be observed that this is not a proceeding under section 396, wherein a party is seeking to be relieved from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect, so as to secure the opportunity to present a meritorious defence. *Nietert* v. *Trentman*, 104 Ind. 390; *Hite* v. *Fisher*, 76 Ind. 231; *Zerger* v. *Flattery*, 83 Ind. 399; *Smith* v. *Noe*, 30 Ind. 117.

Neither is this an application to set aside a judgment by a

party who asserts that he was not within the jurisdiction of the court during the pendency of the action, or when the judgment was rendered, or that, being within the jurisdiction of the court, the judgment was taken against him without notice, through an unauthorized appearance, or by the perpetration of a fraud, upon the discovery of which he proceeded without delay to institute proceedings to set aside or open up the judgment so far as to allow him to present an alleged meritorious defence. *Wiley* v. *Pratt*, 23 Ind. 628; *Bagott* v. *Mullen*, 32 Ind. 332; *Bush* v. *Bush*, 46 Ind. 70; *Coon* v. *Welborn*, 83 Ind. 230; *State, ex rel.*, v. *Holmes*, 69 Ind. 577; *Thompson* v. *Pershing*, 86 Ind. 303; *Cavanaugh* v. *Smith*, 84 Ind. 380.

Whatever the form of the proceeding may be by which a party to a judgment is seeking to review it, or to obtain relief therefrom, if the proceeding is one for which provision is made by statute, and the statutory method is being pursued, or if it is an application which invokes the inherent power of the court for relief from an inequitable judgment, taken against a party by fraud or mistake, so as to obtain the right to present an alleged meritorious defence, which the unauthorized interference of another or the fraudulent conduct of his adversary prevented him from making, such an application, as a general rule, constitutes a direct proceeding in the original case. *Earle* v. *Earle*, 91 Ind. 27, and cases cited; *Hogg* v. *Link*, 90 Ind. 346, and cases cited.

A party who seeks to have a judgment set aside for fraud practiced in obtaining the judgment must show in his application that he has a meritorious defence which he was prevented from making, that he was guilty of no *laches* in failing to prevent or discover the fraud, and that he made his application for relief without delay after the discovery. *Coon* v. *Welborn*, *supra*.

As has been seen, the complaint under consideration lacks all these essentials.

The judgment is assailed solely on the ground that it is

void for want of jurisdiction over the persons of the appellants, and this want of jurisdiction is predicated upon matter *dehors* the record. This is a collateral attack; nothing more nor less. *Reid* v. *Mitchell*, 93 Ind. 469.

The appellants' position is, in effect, that a judgment which appears regular on its face ought to be reviewed and set aside, without regard to the fact that the plaintiffs therein may be entitled to recover another judgment for precisely the same amount on another hearing of the same case.

While a judgment void for want of jurisdiction may be attacked collaterally by a party to the judgment, its invalidity can not be shown in a collateral attack by bringing forward matter extraneous to the record itself. *Cain* v. *Goda*, 84 Ind. 209; *Lantz* v. *Maffett*, 102 Ind. 23.

Where the record of a court of general jurisdiction, either affirmatively or by the presumptions which attach to it, shows that a judgment has been rendered against a party over whom the court had acquired jurisdiction, any attack, the sole purpose of which is to have the judgment declared void by showing facts and circumstances *dehors* the record, is a collateral attack. It has often been decided that such an attack can not be successfully made by a party to the judgment. *Rogers* v. *Beauchamp*, 102 Ind. 33; *Exchange Bank* v. *Ault*, 102 Ind. 322; *Indiana, etc., Co.* v. *Louisville, etc., R. W. Co.*, 107 Ind. 301, and cases cited.

The case of *Pressley* v. *Harrison*, 102 Ind. 14, asserts nothing to the contrary of what has been heretofore said. That case involved an attack by a stranger to the record, and the attack was upon an order of the judge made in vacation. The general rule was there reiterated in the following language: "When the record of a court of general jurisdiction is silent upon the subject of the service of process, the presumption will be indulged that jurisdiction of the person was acquired as against a collateral attack. Parties to the record in such cases, and those in privity with them, will not be heard to impeach it collaterally." For a much greater reason will

parties be concluded where, as in the case before us, the record affirmatively shows an appearance entered of record by the court in term. There was no error in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed Nov. 2, 1887.

119 280
114 458
116 173

No. 12,820.

WHISLER v. LAWRENCE.

SUPREME COURT.—*Showing of Error.—Presumptions.*—All presumptions are in favor of the decisions of the trial court, and where a party claims on appeal that the lower court erred, he must so save and present the alleged erroneous decision, in the record, as to exclude every reasonable presumption in its favor.

From the Whitley Circuit Court.

J. W. Adair and *W. A. Davis*, for appellant.

T. R. Marshall and *W. F. McNagny*, for appellee.

ELLIOTT, J.—The appellant demands a reversal for the reason, as he alleges, that the court erred in taxing costs against him. We are of the opinion that the record does not affirmatively show any error.

The bill of exceptions does not show what matters were presented to the court on the hearing of the motion, nor does it show what action was taken prior to the trial. For aught that appears, there may have been an offer to confess judgment under section 514, R. S. 1881, and we must presume that this was done, or that some other valid reason existed justifying the ruling of the court.

It is firmly settled that, unless the contrary affirmatively appears, all reasonable presumptions will be made in favor of the judgment of the trial court. The recognized rule is thus stated in *Myers* v. *Murphy*, 60 Ind. 282: "All the presumptions are in favor of the correctness of the decisions of the court below, and where a party claims in this court, that any of those decisions are erroneous, he must so save and present the alleged erroneous decision, in the record, as to exclude every reasonable presumption in favor of such decision."

Judgment affirmed.

Filed Oct. 21, 1887.

No. 12,934.

YEAGER v. WRIGHT ET AL.

EVIDENCE.—*Transcript.—Certification by Justice of Peace.—Equivalent Terms.*—The certification of a transcript by a justice of the peace as "a correct statement of the proceedings had before me in the above entitled case" is the practical equivalent of a statement that the transcript is "a true and complete copy" of such proceedings, and authorizes its admission in evidence.

EXECUTION.—*Dormant Judgment.—Validity for Purpose of Execution.*—The validity of a judgment for the purpose of having execution upon it is not impaired because, by the expiration of ten years, it has ceased to be a lien on real estate.

SAME.—*Voidable Execution.—Revival of Judgment.*—An execution issued upon a dormant judgment, without a revival or leave of court, is not void, but only voidable as against direct proceedings to have it set aside.

SAME.—*Transcript from Justice of Peace.—Filing and Recording.—Formal Proof of.—Recitals in Execution.*—Where an execution, issued by the clerk of the circuit court, upon a judgment rendered by a justice of the peace,

is admitted in evidence without any objection that there has been no formal proof that the transcript of the judgment has been filed in the clerk's office and entered in the proper order-book and judgment-docket, recitals contained in the execution that such steps had been taken will be held to supply the omission of such formal proof.

From the Gibson Circuit Court.

H. A. Yeager, for appellant.

C. A. Buskirk and *W. M. Land*, for appellees.

NIBLACK, J.—On the 14th day of March, 1871, Theophilus Wright recovered a judgment against John McIntire before Zenas M. Weed, a justice of the peace of Gibson county, for the sum of $200. On the 4th day of April, 1876, Wright caused a transcript of the judgment thus obtained to be filed in the office of the clerk of the Gibson Circuit Court. Endorsements on this transcript showed that an execution had been issued on the judgment on the 24th day of March, 1871, and had been returned on the 18th day of September in that year, and that another execution had been issued on said 18th day of September and returned on the 6th day of January, 1872, with Wright's receipt thereon for $50. Attached to the transcript was a certificate in the following words:

"I do hereby certify the above to be a correct statement of the proceedings had before me in the above entitled case. Given under my hand and seal this 3d day of April, 1876.

"Z. M. WEED, *Justice*. [SEAL]"

On the 19th day of December, 1882, William C. McIntire, the father of John McIntire, being at the time the owner of certain tracts of land in Gibson county, died intestate. One undivided fifth part of these lands descended to John McIntire as one of the surviving children of the decedent, upon whose estate letters of administration were issued to George W. Davis, one of the appellees.

On the 9th day of July, 1883, a certificate, executed by Weed, the justice, stating that, on the 16th day of January,

1883, an execution had been issued on the above named judgment and delivered to the proper constable, who had made a return that no goods or chattels could be found to satisfy the judgment, was filed in the proper clerk's office of the county. Wright, on the same day, filed with the clerk his affidavit, alleging that the judgment remained unsatisfied, and that there was then due thereon, as a balance of principal and interest, the sum of $269.95, and for costs the sum of $4.05. The clerk thereupon issued an execution upon the judgment, which was directed and delivered to the sheriff of Gibson county. The sheriff levied the execution on the undivided fifth part of the lands which had descended to John McIntire from his father, and advertised and, on the 25th day of August, 1883, sold such undivided fifth part at sheriff's sale, Wright becoming the purchaser and in due time receiving a sheriff's deed for the same. In the meantime Davis, as administrator of the estate of William C. McIntire, filed his petition in the Gibson Circuit Court, praying that the lands which had descended to John McIntire and the other children and heirs at law of the decedent might be sold to pay the debts and expenses outstanding against the estate, and making the said John McIntire and the other children and heirs at law defendants to such petition. That court accordingly ordered the lands in question to be sold to pay such debts and expenses. In pursuance of such order, Davis, on the 14th day of March, 1884, sold, and afterwards conveyed, such lands to a person other than Wright.

On the 29th day of January, 1886, Davis filed in the office of the clerk of the court below his account for the final settlement of William C. McIntire's estate. The clerk, by his endorsement thereon, set the account down for hearing on the 20th day of February, 1886.

This account showed a balance of $901.99 in Davis' hands for distribution, which was the remaining part, and consisted of the proceeds of the lands sold by Davis, as hereinabove

stated, and that of that amount John McIntire was entitled to receive the sum of $180.89.

On the 26th day of February, 1886, the account not having yet been heard or acted upon, the appellant, Henry A. Yeager, filed his intervening petition setting forth that, on the 30th day of March, 1885, he had purchased of John McIntire all his interest in the estate of the decedent, William C. McIntire, and had received an assignment and transfer of such interest in writing, which he exhibited with his petition, and praying that the amount shown to belong to the said John McIntire should be ordered to be paid to him. On the same day the appellee Wright also filed an intervening petition setting up the facts which led to his purchase, as well as the fact of his purchase, of the interest of John McIntire in the lands which had descended to him from his father, and the sale of the interest so purchased by him with the interests of the other heirs by Davis to pay the debts and charges against the estate of William C. McIntire, and praying that he might be subrogated to the right of the said John McIntire to a distributive share in the proceeds of the lands so sold by Davis and in his hands for distribution, as shown by the account for final settlement.

After hearing the evidence submitted by the parties, and an examination of the matters embraced in the account for final settlement, the circuit court approved and confirmed the account and ordered that Wright be subrogated to the interest of John McIntire in the money in Davis' hands for distribution, and that he, the said Wright, was entitled to receive the distributive share so due in right of the said John McIntire.

Yeager, who had first proved an assignment and transfer to him of John McIntire's interest in the estate as alleged, reserved exceptions upon the introduction in evidence of the transcript of the judgment, of the execution issued by the clerk of the circuit court, the sheriff's return to that execution and the sheriff's deed to Wright; also, upon the suffi-

ciency of the evidence to sustain the order subrogating Wright to the interest of John McIntire in the surplus in Davis' hands for distribution.

Substituting the circuit court for the court of common pleas, as the act abolishing the latter court did, the civil code of 1852, which was in force when the transcript in evidence in this case was filed in the clerk's office, provided that "It shall be the duty of every justice of the peace in this State, when requested by the plaintiff or his agent, to make out and certify a true and complete transcript of the proceedings and judgment in any cause, upon any docket, legally in his possession. The plaintiff may file such transcript in the office of the clerk of any circuit court in this State." Also, that "It shall be the duty of the clerk forthwith to record the transcript in the order-book, and docket the judgment in the judgment docket. The judgment set forth in the transcript shall be a lien upon the real property of the defendant within the county, to the same extent as judgments of the circuit court from the time of filing the transcript." 2 R. S. 1876, 236, sections 539 and 540.

The objections urged to the introduction of the transcript in evidence were:

First. That it was not certified as the law required.

Second. That the issuance of execution had been so long delayed that the judgment had become dormant, and that by the lapse of more than ten years the judgment had ceased to be a lien on real estate, and, therefore, to have the force and effect, in any respect, of a judgment rendered in the circuit court.

As applicable to the first objection, section 459, R. S. 1881, which has been in force ever since the civil code of 1852 went into effect, declares that "Copies of the proceedings and judgments of any justice of the peace of this State, certified under his hand and seal, or under the hand and seal of the justice who may have the legal custody thereof, as true and complete copies of such proceedings or judgments,

shall be received as evidence in the several courts in this State."

The statement that a transcript contains "a correct statement" of certain proceedings is the practical equivalent of a certificate that the transcript is "a true and complete copy" of such proceedings, and this is especially the case where, as in this case, the transcript purports to, and apparently does, contain a complete copy of appropriate proceedings within the jurisdiction of a justice of the peace.

The judgment rendered in this case was copied into and constituted a part of the proceedings set out in the transcript. The certificate of the justice, therefore, that the transcript gave "a correct statement of the proceedings had before" him in the cause, was, as we believe, also a sufficient verification of the completeness of the transcript as to the judgment.

The word "proceeding," in a judicial sense, is much more comprehensive than that of "judgment," the former very frequently including the latter. We consequently regard the certificate to the transcript in evidence in this case as having been, in connection with the context, substantially sufficient. This conclusion is, we think, fairly sustained by the case of *Fisher* v. *Hamilton*, 49 Ind. 341.

In response to the second objection, it may be said that the validity of a judgment for the purpose of having execution upon it is not impaired because, by the expiration of ten years, it has ceased to be a lien upon real estate. This was practically, as well as correctly, settled by the case of *Martin* v. *Prather*, 82 Ind. 535.

The doctrine that an execution issued on a dormant judgment, without a revival or leave of court, is not void, but only voidable as against direct proceedings to have it set aside or annulled, was also reaffirmed in that case. On that subject see, also, the cases of *Mavity* v. *Eastridge*, 67 Ind. 211, and *Richey* v. *Merritt*, 108 Ind. 347.

It follows that the transcript was properly admitted in ev-

idence, notwithstanding the second objection to its admissibility.

It was insisted, as objections to the introduction in evidence of the execution, and of the sheriff's return made to it,

First. That it had been issued upon a dormant judgment, without a revivor or leave of court.

Second. That the judgment on which it purported to have been issued had never been a lien on the real estate levied on by it.

Third. That the levy of the execution, under the circumstances, created no lien on the real estate in question.

Fourth. Substantially the same as the third.

Fifth. That the interest of John McIntire in the lands levied on was not, at the time of the levy, subject to sale on execution.

Sixth. That the levy and sale exhibited by the sheriff's return did not confer on Wright any just claim to John McIntire's interest in the surplus in Davis' hands for distribution.

What we have already said answers the first four objections thus stated, as well as certain objections made to the admissibility of the certificate of the justice that no goods or chattels could be found to satisfy the judgment, and of the affidavit of Wright to obtain the issuance of the execution in evidence.

No argument is submitted in support of the fifth and sixth objections to the reading of the execution in evidence, and, consequently, no question is presented here upon them.

There was no formal evidence introduced at the trial showing that the transcript from the justice's docket had been either recorded on the order-book of the circuit court or entered on the judgment docket of that court, and for that reason it is claimed that the finding of the circuit court in favor of Wright was not sustained by sufficient evidence. But the execution which was read in evidence, as has been shown, contained a recital that the transcript of the judg-

ment upon which it had been issued had not only been filed in the clerk's office, but had also been recorded in the proper order-book and entered on the appropriate judgment docket, and, in the absence of any objection to the admissibility of the execution on account of the omission of formal proof of the matters thus recited, we construe this recital by the execution as tending to supply the omission of more formal proof of the existence of the facts so recited. *Stockwell* v. *State, ex rel.*, 101 Ind. 1; *Riehl* v. *Evansville, etc., Ass'n*, 104 Ind. 70. If Yeager had objected to the reading of the execution in evidence because no proof had been made of the recording of the transcript and of the docketing of the judgment, and his objection had been overruled, a very different question would have been presented. But as the question which would have been thus presented is, as applicable to this case, a merely hypothetical one, we intimate no opinion upon it at the present hearing. 2 Works Pr., section 1037; *Berry* v. *Reed*, 73 Ind. 235; *Bell* v. *Davis*, 75 Ind. 314; *State, ex rel.*, v. *Record*, 80 Ind. 348; *American Ins. Co.* v. *Gibson*, 104 Ind. 336.

The judgment is affirmed, at the appellant's costs.

Filed Nov. 3, 1887.

112 237
114 17
112 237
147 27
112 237
157 35
112 237
170 452
170 491

No. 13,903.

The State v. Wells.

Statute.—*Two Acts Upon Same Subject.*—*When Repeal not Implied.*—Where two acts relate to the same subject, both are to be given effect if possible, and the prior one will not be deemed repealed by implication unless the later covers the whole subject-matter embraced therein, adds new provisions and imposes different or additional penalties.

The State v. Wells.

CRIMINAL LAW.—*Embezzlement by Public Officers.—Repeal of Statute.*—Section 1943, R. S. 1881, upon the subject of embezzlement by public officers, was not repealed by the act of March 5th, 1883 (Acts of 1883, p. 106). *Mason* v. *State*, 108 Ind. 48, modified.

SAME.—*Drainage Commissioner.—Embezzlement by.*—A drainage commissioner is an officer of the county for which he is appointed, within the purview of section 1943, and for a failure, when he goes out of office, to pay over to his successor moneys received by him in his official capacity, as required by the act of 1883, he is guilty of embezzlement and subject to the penalties prescribed by section 1943.

From the Hamilton Circuit Court.

J. F. Neal, Prosecuting Attorney, *T. J. Kane* and *T. P. Davis*, for the State.

F. M. Trissal, for appellee.

MITCHELL, J.—The grand jury of Hamilton county returned an indictment into the Hamilton Circuit Court, at its September term, 1886, in which it was charged that Samuel B. Wells, theretofore a duly appointed and qualified commissioner of drainage, had, on or about the 30th day of May, 1886—he having previous to that date resigned his office—feloniously failed and refused to pay over to his successor in office certain moneys which had been collected and received by him on account of assessments made for defraying the costs and for the construction of a certain drain theretofore duly ordered and established in Hamilton county.

The court quashed the indictment. The propriety of this ruling depends upon whether or not the act of March 5th, 1883, entirely abrogated or repealed section 1943, R. S. 1881.

This latter section provides that "Any county treasurer, county auditor, sheriff, clerk, or receiver of any court, township trustee, justice of the peace, mayor of a city, constable, marshal of any city or incorporated town, or any *officer* or agent of any county, civil or school township, city, or incorporated town, who shall fraudulently fail or refuse, at the expiration of the term for which he was elected or appointed, or at any time during such term, when legally required by

the proper person or authority, to account for, deliver, and pay over to such person or persons as may be lawfully entitled to receive the same, all moneys, choses in action, or other property which may have come into his hands by virtue of his said office, shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the State prison for any period not more than five years nor less than one year, and fined in any sum not exceeding one thousand dollars, and rendered incapable of holding any office of trust or profit for any determinate period."

The act of March 5th, 1883 (Acts 1883, p. 106), which is entitled "An act relating to county, State, and other officers, and the payment by them to their successors in office of all moneys in their hands at the expiration of their terms of office, and providing penalties for failure to do so," reads as follows:

"That it shall be the duty of each clerk, sheriff, and treasurer of the several counties in this State, and every other officer receiving money in his official capacity, at the expiration of his term of office, to pay over to his successor in office all moneys of every description, to whomsoever due, remaining in his hands at the expiration of such term, taking the receipt of such successor therefor; and such successor and his sureties shall be liable therefor on his official bond, as if the same had been originally collected by him; and any clerk, treasurer, or sheriff, so failing to pay over such moneys, or any successor [of such] clerk, treasurer or sheriff, who shall fail to pay over any moneys to parties entitled to receive the same when called on to do so, shall be deemed guilty of embezzlement, and, on conviction thereof, shall be fined in any sum not exceeding one thousand dollars, and be imprisoned at hard labor in the State prison not less than one nor more than five years."

A comparison of these several statutes discloses the purpose of the Legislature in each.

Section 1943 makes any of the officers therein specially

named, or any officer or agent of a municipal corporation, subject to indictment and conviction for embezzlement, who fraudulently fails or refuses at the expiration of his term, or at any time *during such term*, when legally required to do so, to account for, deliver, and pay over to the person or persons entitled to receive the same any and all moneys, choses in action, or other property, which may have come to his hands by virtue of his office.

The act of 1883 has relation to the duties of officers at the expiration of their terms of office. That act affirmatively requires all county clerks, sheriffs and treasurers, and every other officer, whether he be a State, county or municipal officer, who receives money in his official capacity, to pay over all such moneys as may remain in his hands at the expiration of his term, no matter to whom it may belong, to his successor in office, and take his receipt therefor. It also makes any county clerk, sheriff, or treasurer, who fails to pay over to his successor as required, guilty of embezzlement, and it makes the successor guilty of the like offence, in case he fails or refuses, when called upon to do so, to pay the money thus received by him to the persons entitled to it. Under this latter act clerks, sheriffs and treasurers are not liable to punishment for failing or refusing to pay money, or deliver property, or choses in action, to the persons to whom it may belong, at any intermediate period before the expiration of their terms, except it be money turned over to them by their predecessors in office.

It may be supposed that the Legislature was cognizant of the fact that county clerks, sheriffs and treasurers become the custodians of funds and property, by virtue of their respective offices, which belong to individuals, and it may have been supposed that instances might arise, or probably have arisen, where officers of the class mentioned would retain such moneys or property in their own possession at the expiration of their terms, instead of turning it over to their successors in office. Thus it would follow that moneys and

property which should be kept in the custody and under the protection of a public officer, in a public office, would be subject to the vicissitudes and perils of being in the custody and use of private individuals who might or might not be readily accessible to the persons entitled to it. This was the mischief at which the act of March 5th, 1883, was aimed. The effect and purpose of that act was to make it the duty of all officers to turn over to their successors all moneys remaining in their hands at the expiration of their terms, and to punish the officers therein named for failing to comply with their duties, as prescribed by that act. It did not, however, affect the liability of any of the officers embraced within the provisions of section 1943 who fraudulently fail or refuse to account for, deliver, and pay over to such person or persons as are lawfully entitled to receive, or to whom such officers are required by competent authority to turn over, any moneys, choses in action, or property which may be received by them in their official capacity during their respective terms.

A fraudulent failure to pay over or deliver to the persons entitled, or in accordance with the requirement of competent authority, at any time during the term of the respective officers embraced by section 1943, exposes the officer to the penalties prescribed by that section. Likewise, a fraudulent failure of any such officer to pay over to his successor, as required by the act of March 5th, 1883, leaves all such officers, except clerks, sheriffs and treasurers, liable to prosecution under the same section. In respect to clerks, sheriffs and treasurers, their liability for failing to pay all money, to whomsoever due, which remains in their hands at the expiration of their respective terms, or for failing to pay money during their terms, which was turned over to them by their predecessors, to the persons entitled to receive the same, is fixed by the later act.

There is, therefore, no apparent repugnance between the several statutes under consideration, except as to the liability

of county clerks, sheriffs and treasurers, and as to those officers only in respect to their liability for failing to pay over to their successors any moneys which may remain in their hands at the expiration of their respective terms. For such defaults they are liable under the act of March 5th, 1883. For the defaults specified in section 1943, the liability of clerks, sheriffs and treasurers, and all other officers embraced by its terms, remains unaffected by the later act. This is according to the rule which requires that where there are two acts which relate to the same subject, both are to be given effect if that be reasonably possible. If the later act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties for the same offences as are embraced by the old, the later act, in such a case, operates as a repeal of the old, without any repealing clause. Or, as it was well stated in *Wagoner* v. *State*, 90 Ind. 504: "The general rule is that where a new statute covers the whole subject-matter of an old one, adds new offences and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication." *Norris* v. *Crocker*, 13 How. (U. S.) 429; *President, etc.*, v. *Bradshaw*, 6 Ind. 146; *Leard* v. *Leard*, 30 Ind. 171; *Dowdell* v. *State*, 58 Ind. 333; *State* v. *Christman*, 67 Ind. 328; *Western Union Tel. Co.* v. *Brown*, 108 Ind. 538; *United States* v. *Tynen*, 11 Wall. 88; *Robinson* v. *Rippey*, 111 Ind. 112, and cases cited; *Pennsylvania Co.* v. *Spaulding*, *ante*, p. 47.

The later act under consideration does not cover the entire subject-matter of section 1943; nor can it be said that it in terms adds new offences.

As we have already seen, so much of the act of March 5th, 1883, as imposes penalties is in no respect in conflict with section 1943, except in so far as the act relates to certain designated officers, viz., clerks, sheriffs and treasurers, and in respect to those officers the penal part of the later act is only variant from the earlier in so far as it imposes liability

for failing to turn over moneys remaining in their hands to their successors at the expiration of their terms of office.

It can not be implied from the act of 1883 that the Legislature intended to absolve all the officers named in section 1943, except clerks, sheriffs and treasurers, from punishment for embezzling funds or property received by them in their official capacity, or that it was the intention to absolve clerks, treasurers and sheriffs from liability for embezzling, or fraudulently failing or refusing to deliver to the persons entitled thereto, money or property during their continuance in office.

A drainage commissioner is an officer of the county for which he is appointed, within the purview of section 1943. The indictment charges that the appellee, as such officer, received certain moneys, by virtue of his office; that his successor in office demanded the money from him, and that he fraudulently failed and refused to deliver it, and feloniously embezzled, retained, and converted the same to his own use. When he resigned his office it became his duty, under the act of 1883, to pay over to his successor in office such moneys received by him in his official capacity as remained in his hands, without regard to whom it belonged; and if it be true, as charged, that he fraudulently failed and refused to do so, but embezzled and converted the money to his own use, he is subject to the penalties prescribed in section 1943.

The several statutes we have been considering were the subject of review, to some extent, in the recent case of *State* v. *Mason*, 108 Ind. 48. That was a case in which an indictment had been returned against a county treasurer, charging him with having embezzled, and failed to pay over to his successor in office, moneys remaining in his hands at the expiration of his term.

The indictment was returned after the act of 1883 came into force, but the offence was charged as having been committed at a date prior to the enactment of that statute.

The point was made that the statute in force at the time

the alleged offence was committed had been repealed by implication by the later act, and that, in the absence of a clause saving prosecutions for offences committed while the prior act was in force, the prosecution could not be maintained.

That being a case for the default of a county treasurer for failing to pay money remaining in his hands at the expiration of his term to his successor, it fell within the general purview of the act of 1883, and the court arrived at the conclusion that, as applied to the facts in that case, section 1943 was repealed by the later act.

Although some of the language of the opinion might warrant the inference that it was intended to decide that the later act entirely abrogated the earlier, and to that extent may have been too broad, nevertheless, as applied to that case, as it was presented, the construction of the statute was not in conflict with the views hereinabove expressed, as applied to county treasurers who are in default for not having paid over to their successors at the expiration of their terms.

It is to be observed further, that in the case referred to the attention of the court was in no way called to the act of July 2d, 1877, embodied in section 248, R. S. 1881, which provides, substantially, that the repeal of any statute shall not have the effect to extinguish or release any penalty or liability incurred under such statute, unless the repealing act shall so expressly provide.

Had the attention of the court been called to this statute, a different conclusion from that reached might have followed in that case.

To the extent that any general expressions used in *State* v. *Mason*, *supra*, may seem to conflict with the conclusions above, such expressions may be deemed to be modified by this opinion.

Judgment reversed, and cause remanded, with instructions to overrule the motion to quash.

Filed Nov. 4, 1887.

No. 12,640.

119 245
128 180
172 245
148 229

THE STATE *v.* STOUT.

CRIMINAL LAW.— *Prostitute.— Indictment.— Duplicity.*— Where a statute, like section 2003, R. S. 1881, on the subject of prostitution, makes it an offence to do this, or that, or another thing, mentioning several things disjunctively, either one of which would constitute the same offence, subject to the same punishment, it is the general rule that all the things mentioned may be charged conjunctively in a single count, as constituting but a single offence.

From the Monroe Circuit Court.

J. E. Henley, Prosecuting Attorney, *J. W. Buskirk* and *H. C. Duncan*, for the State.

ELLIOTT, J.—The offence for which the appellee was prosecuted is thus charged in the information: "The said Florence Stout did then and there unlawfully frequent and live in a certain house of ill-fame, to wit, the house of James Stout, on Third street, in the city of Bloomington, State and county aforesaid, and did then and there unlawfully associate with women of bad character for chastity, to wit, Martha Mershon, Jane Releford and Emma J. Young, in public places then and there situate, to wit, on the public walks of said city of Bloomington, and at houses which men of bad character frequent and visit, to wit, the house of said James Stout, and the house of one Martha Mershon, and did then and there commit fornication for hire with Oscar Strother and divers other persons."

We have no brief from the appellee, but we understand from that of the appellant that the information was held bad for duplicity.

The information is founded on section 2003, R. S. 1881, which provides that "Any female who frequents or lives in houses of ill-fame, or associates with women of bad character for chastity, either in public or at a house

which men of bad character frequent or visit; or who commits fornication for hire,—shall be deemed a prostitute."

We think the case falls within the rule thus stated in *Fahnestock* v. *State*, 102 Ind. 156: "Where a statute, like section 2002, above quoted, makes it an offence to do this, or that, or another thing, mentioning several things disjunctively, either one of which would constitute one and the same offence, subject to one and the same punishment, it is the general rule that all the things mentioned in the statute may be charged conjunctively in a single count, as constituting but a single offence." *Davis* v. *State*, 100 Ind. 154, and authorities cited.

Judgment reversed.

Filed Nov. 4, 1887.

113	246
117	458
121	387
112	246
136	471
112	246
146	566

No. 12,781.

George H. Hammond & Co. v. Schweitzer.

Negligence.—*Sufficiency of Complaint Charging.*—A general allegation of negligence in the performance, or in failing to perform, a duty which the law casts upon a defendant, resulting in injury to the plaintiff, without his fault, is sufficient to withstand a demurrer.

Same.—*Master and Servant.*—*Dangerous Machinery.*—Where an employer negligently permits an elevator, which an employee in the performance of his duty is required to go upon, to become dangerous and to remain unfit for use, and the latter, having no knowledge of its dangerous condition, and being without fault, is injured while in the course of his employment by reason of its unsafe condition, the employer is liable.

From the Lake Circuit Court.

J. Kopelke, for appellant.

E. Griffin, *C. F. Griffin*, *J. B. Julian* and *J. F. Julian*, for appellee.

MITCHELL, J.—The complaint in this case charges that, on the 26th day of January, 1885, the appellee, Schweitzer, was in the employ of George H. Hammond & Co., a corporation engaged in the manufacture of glue and other commodities at Hammond, Indiana. While so employed the plaintiff alleges that it became his duty to use, and pass up and down upon, an elevator supplied by the company for the purpose of carrying material back and forth from the basement to the top of the building in which the company conducted its business. The plaintiff alleges that, by the carelessness and negligence of the company, the cable and other apparatus connected with the elevator were, with the defendant's knowledge, permitted to be and remain unsafe, dangerous and unfit for the purposes for which they were used, of which fact the plaintiff alleges he was ignorant. He charges that, while ascending from the basement in the line of his duty, the cable which supported the elevator broke, or slipped, thereby causing the elevator, with the plaintiff upon it, to be precipitated some twenty feet to the basement, whereby the plaintiff, without any fault, sustained grievous bodily injuries.

This complaint is not open to the objections urged against it by the appellant. It charges generally that the appellant carelessly and negligently permitted its elevator, which the plaintiff in the performance of his duties was required to go upon, to become dangerous, and to be and remain unfit for use, and that the latter, without knowledge of its dangerous condition, while in the course of his employment, was injured, without his fault, by reason of the unsafe condition of the elevator.

It has been repeatedly held that a general allegation of negligence in the performance of, or in failing to perform, a duty which the law casts upon a defendant, resulting in injury to a plaintiff, who is without fault, is sufficient to withstand a demurrer. *Cleveland, etc., R. W. Co.* v. *Wynant*, 100 Ind.

160; *Pittsburgh, etc., R. W. Co.* v. *Adams*, 105 Ind. 151; *Town of Rushville* v. *Adams*, 107 Ind. 475.

If the defendant desired the complaint to specify more particularly wherein the plaintiff claimed the defendant was negligent, a motion to make the complaint more specific would have presented the question.

Where the necessities of his employment require an employee to use machinery or appliances in the course of his employment, the employer owes the corresponding duty of exercising care in furnishing and maintaining machinery and appliances that are reasonably safe, or of giving notice to the employee of defects that are not obvious or of which the latter has no knowledge.

This duty rested upon the appellant, and, according to the averments in the complaint, it negligently and carelessly omitted to discharge its obligation in that regard to the appellee.

The distinction between the complaint before us and that involved in *Pennsylvania Co.* v. *Marion*, 104 Ind. 239, relied on by the appellant, is that in the latter case the complaint contained no general charge of negligence, while the complaint under consideration alleges that the appellant carelessly and negligently permitted, etc.

Under the assignment that the court erred in overruling the appellant's motion for a new trial two points are presented:

First, it is argued that the evidence shows that the elevator was not intended to be used in carrying persons, and that the appellee went upon it voluntarily and without any direction from the appellant, and that his going upon it was altogether unnecessary in the performance of his duties, and solely for his own convenience. Secondly, the appellant contends that it appears from the evidence that the appellee had been frequently warned not to go upon the elevator, on account of its being unsafe and liable to fall.

As a matter of course, if either of the foregoing proposi-

tions had been established, there could have been no recovery. As the evidence appears in the record, it seems to preponderate overwhelmingly in favor of the appellant on both propositions; but that is to no purpose here, since it can not be denied that, if full credit was given to the testimony of the appellee, there was at least some evidence which tended to sustain the finding and judgment. It was the province of the court and jury to accept the evidence of the appellee in preference to that of the other witnesses, and, having evidently done so, it is needless to repeat what has been so often said, that this court will not enter upon the task of weighing the evidence. It may be well enough to remark that this rule, which is entirely appropriate for, and the only one practically applicable in, an appellate tribunal, is not to be adopted or applied by the trial courts, in which opportunities are afforded the judges of observing the conduct of witnesses, and of obtaining possession of facts which can not possibly be conveyed to this court upon the record.

This court always presumes that the trial court has exercised its exclusive privilege of passing upon the weight of the testimony, and that, if the verdict had not been supported by the weight of the evidence, the court below would have unhesitatingly set it aside and granted a new trial.

All that this court can do is to look into the record for the purpose of ascertaining whether there is any competent evidence which fairly tends to support the finding; or, in a civil case, where the rule requires that the issue be supported by clear and convincing proof, and not simply by a preponderance of the evidence, this court will look into the evidence for the purpose of determining whether that rule has been disregarded. *Ford* v. *Osborne*, 12 N. E. Rep. 526.

The judgment is affirmed, with costs.

Filed Nov. 5, 1887.

112	250
112	387
112	563
113	198
113	203
113	563
114	37
115	119
115	255
116	44
117	390
117	451
118	57
118	303
120	474
112	250
127	150
112	250
131	33
131	299
112	250
134	566
134	677
136	262
136	686
112	250
144	447
146	433
112	250
149	500
149	504
151	362
112	250
154	72
112	250
158	277
112	250
162	469
162	470

No. 12,817.

Palmer v. The Chicago, St. Louis and Pittsburgh Railroad Company.

Demurrer to Evidence.—*Truth of Facts.—Inferences.—Practice.*—In considering a demurrer to evidence, the court is bound to accept as true all the facts which the evidence tends to prove, and, as against the demurring party, to draw from the evidence all such reasonable inferences as a jury might draw.

Same.—*Conflicting Evidence.—What Can be Considered.*—If there is a conflict in the evidence, then only such as is favorable to the party against whom the demurrer is directed can be considered, and that which is favorable to the demurring party is deemed to be withdrawn.

Same.—*Question Presented.—Bill of Exceptions.*—Where evidence is incorporated, as it must be, in the demurrer, the only question presented is the sufficiency of the evidence to sustain a right of action, and exceptions to rulings in rejecting or receiving evidence are not presented, a bill of exceptions being necessary for that purpose.

Negligence.—*Railroad.—Trespasser.*—No action will lie against a railroad company for causing the death of a trespasser upon its track unless the act of its employees was wilful.

Same.—*Presumption that Person will Leave Track.*—An engineer of a moving train has a right to presume, until the last moment, that a person walking on the railroad track will leave it in time to avert danger.

Same.—*Wilfulness.—Constructive Intent to Inflict Injury.*—To constitute wilfulness, in a legal sense, it is not necessary that there should be a formed and direct intention to kill or wound any particular person; but the intent may be a constructive or an implied one.

Same.—*Reckless Disregard of Consequences.*—A reckless disregard of consequences may be so great as to imply a willingness to inflict an injury, and as to entitle a trespasser to recover, although there is no actual intent to harm him.

Same.—*Person Unconsciously in Peril.—Duty to Stop Train.*—If two men are seen on the track in front of a train, one risking his own safety in an effort to signal the foremost man to leave the track, the engineer is guilty of a wilful wrong if, seeing the signals, he fails to use ordinary care to stop the train; but it is otherwise if he does not see the signals.

Same.—*Rate of Speed.—When Not Material.*—As applicable to an injury to a trespasser, the rate of speed at which the train was run is not material, unless there be something making it evidence of an intentional or wilful act.

Palmer v. The Chicago, St. Louis and Pittsburgh Railroad Company.

SAME.— *Use of Track by Public.— License.*— Where a railroad company, either expressly or by clear implication, licenses the public to use its track in a city, town or village, it can not treat one who avails himself of the license as a trespasser.

From the Lake Circuit Court.

M. Wood and *T. J. Wood*, for appellant.

N. O. Ross, for appellee.

ELLIOTT, J.—There is evidence showing these facts: James W. Palmer, seventeen years of age, was run over and killed by one of the appellee's trains while walking along its track not far from a highway crossing in the village of Leroy. His hearing was so defective that he could not hear the rumble of an approaching train if very far off, but he could hear the whistle of the locomotive. The father of the young man said, in the course of his testimony: "I looked up on top of the grade and saw this train coming. James was walking right to the tank. I just ran across the track, between the main track and the switch, and I took off my hat and signalled to him to stop. He never saw the train. I don't know that the engineer saw me. I ran to within sixty-six feet of him, and it was to about twenty-four rods of where they killed the boy. When James went on the track he looked west and he looked east, the same as common. He expected the eastern freight train, likely, going west, instead of this eastern extra passenger. The train was about eighty rods from me when I made the signals. I saw the boy was not looking back. I took off my hat and swung it for a signal. I knew what the signals were as well as they did on a railroad track; I have been on it long enough. I ran on, swinging my hat, till they knocked me down. I was tolerably close to the boy myself. I ran ahead, waving my hat. I aimed to run ahead of the boy so he would see me and get off the track. I ran right across the main track between the switch. I ran towards the boy between the tracks. I ran within sixty-six feet of the boy, and it was twenty-four rods

to where he was struck from where he stepped on the track. The engineer was on the south side. When the train passed the switch, right where I put up the switch-light, the engineer yelled out; that was within six or eight or ten rods of the house. By 'yelled out' I mean he whistled. There was no slackening of speed that I could see. When they whistled they were within about thirty rods of the boy. The train was running through the village at pretty close to forty miles an hour. It knocked me from the track. The village has about seventy-five inhabitants. There are two stores on the south side of the track and a hay barn on the north side. It (the train) threw me on the ground. It was, I think, the wind of the train that did it."

The mother of the deceased testified that she was standing in a "shanty used as a cook-room;" that she saw her husband running and waving his hat, and that he hallooed so loud that she heard him above the noise of the train.

The engineer of the train testified that he saw the deceased on the track; that he whistled several times to warn him; that he expected that he would leave the track, and that he did not know that the deceased was deaf. The engineer also testified: "I was at the window looking out, and had been most, if not the entire, time after leaving Crown Point. I saw two persons on the track; one was some distance behind the other, and both were going in the same direction the train was going. The hindmost one, or the one nearest the train, got off the track after I sounded the whistle. I could not tell whether either of them was running or not; if he was, I did not discover the fact. I did not see either of them wave a hat."

The trial court sustained the appellee's demurrer to the evidence.

It is important, at the outset, to state the principles which the court must obey in considering a demurrer to evidence, and these are:

First. The court is bound to accept as true all the facts

which the evidence tends to prove, and, as against the party demurring, to draw from the evidence all such reasonable inferences as a jury might draw. *Willcuts* v. *Northwestern M. L. Ins. Co.*, 81 Ind. 300, and cases cited; *Hagenbuck* v. *McClaskey*, 81 Ind. 577; *Radcliff* v. *Radford*, 96 Ind. 482; *McLean* v. *Equitable L. Assurance Soc.*, 100 Ind. 127 (50 Am. R. 779); *North British, etc., Ins. Co.* v. *Crutchfield*, 108 Ind. 518.

Second. If there is a conflict in the evidence, then only such evidence as is favorable to the party against whom the demurrer is directed can be considered, and that which is favorable to the demurring party is deemed to be withdrawn. *Fritz* v. *Clark*, 80 Ind. 591; *Ruddell* v. *Tyner*, 87 Ind. 529; *Adams* v. *Slate*, 87 Ind. 573; *McLean* v. *Equitable L. Assurance Soc., supra; Lake Shore, etc., R. W. Co.* v. *Foster*, 104 Ind. 293 (54 Am. R. 319).

The question, therefore, as the record presents it to us, is this: Does the evidence, considering only that which is favorable to the appellant, and yielding to him the full benefit of all the reasonable inferences for which it supplies a foundation, entitle him to a recovery on the cause of action stated in the complaint?

We have restricted our statement of the question by saying that the evidence must be such as will support the cause of action declared on, because, even on a demurrer to the evidence, it is only on that cause of action that there can be a recovery.

Under the firmly settled rule, the deceased must be regarded as having been a trespasser on the track of the railroad company at the time of his death. *Louisville, etc., R. W. Co.* v. *Ader*, 110 Ind. 376; *Belt R. R. Co.* v. *Mann*, 107 Ind. 89; *Louisville, etc., R. W. Co.* v. *Bryan*, 107 Ind. 51; *Louisville, etc., R. W. Co.* v. *Schmidt*, 106 Ind. 73; *Chicago, etc., R. R. Co.* v. *Hedges*, 105 Ind. 398; *Terre Haute, etc., R. R. Co.* v. *Graham*, 95 Ind. 286 (48 Am. R. 719); *Indianapolis, etc., R. R. Co.* v. *McClaren*, 62 Ind. 566.

As he was a trespasser, no action will lie against the corporation for causing his death unless the act of its employees was wilful. A trespasser can not maintain an action where the tort of the defendant is nothing more than the omission to exercise care. *Terre Haute, etc., R. R. Co.* v. *Graham, supra; Pennsylvania Co.* v. *Sinclair*, 62 Ind. 301 (30 Am. R. 185); Beach Cont. Neg., pp. 205, 208, 209.

If, then, this action can be maintained it must be on the ground that the wrongful acts of the employees of the appellee were wilful. We regard the decision in *Terre Haute, etc., R. R. Co.* v. *Graham, supra*, as correctly declaring the general rule upon this subject, and we can not depart from it. *Louisville, etc., R. W. Co.* v. *Ader, supra; Belt R. R. Co.* v. *Mann, supra; Louisville, etc., R. W. Co.* v. *Bryan, supra;* Beach Cont. Neg., p. 209.

We have no doubt that the case of *Terre Haute, etc., R. R. Co.* v. *Graham, supra*, is right in asserting that an engineer of a moving train has a right to presume, until the last moment, that a person walking on the track will leave it in time to avert danger. Nor do we doubt that these general rules were correctly applied in that case. *Pennsylvania Co.* v. *Sinclair, supra; Indianapolis, etc., R. R. Co.* v. *McClaren, supra; Donaldson* v. *Milwaukee, etc., R. W. Co.*, 21 Minn. 293; *Gaynor* v. *Old Colony, etc., R. W. Co.*, 100 Mass. 208; *Morrissey* v. *Eastern R. R. Co.*, 126 Mass. 377 (30 Am. R. 686); *Mason* v. *Missouri Pacific R. W. Co.*, 27 Kan. 83 (41 Am. R. 405); *Rothe* v. *Milwaukee, etc., R. R. Co.*, 21 Wis. 256; *Harty* v. *Central R. R. Co.*, 42 N. Y. 468; *Lake Shore, etc., R. R. Co.* v. *Miller*, 25 Mich. 274.

But, while we fully affirm the doctrine of the case referred to, we can not regard it as decisive of this case upon the theory on which the appellant's argument proceeds.

It is our judgment that there may be a wilful act, in a legal sense, without a formed and direct intention to kill or wound any particular person. There may, in other words, be a constructive or an implied intent without an express one. To

use an illustration supplied by one of the members of the court in consultation, suppose that a warning signal is given an engineer, clearly conveying to his mind that there is danger ahead, that he sees the signal of warning, and, regardless of the warning thus given, he keeps his engine in motion and runs upon a bridge weakened by flood or fire, would there not be wilfulness in a legal sense, although there was nothing more than a wilful disregard of danger? Or, to take another illustration, suppose an engineer sees two men on the track, and sees one of them making signals to the other to leave it, would it not be wilfulness to run upon the man to whom the signals were made without any effort to check the train? Of course, without such signals, or something of a warning nature to attract the attention of the engineer, he would have a right to presume that the man would leave the track; but to keep on in disregard of signals of warning seen by him is a very different thing from proceeding where there is nothing to arouse attention and create a belief that there is a reason why the train should be brought to a halt.

Once again, to illustrate, suppose a man is on the track, in reality fastened there, but in appearance at full liberty to leave it at will, this appearance would justify the engineer in presuming that he would step from it in time to escape danger, and there would not be wilfulness in running upon him; but if the fact be added to this supposed case that a third person was seen by the engineer endeavoring to warn the man off the track, or signalling for the train to stop, would it not, in legal contemplation, be a wilful act to keep the train in motion without any effort at all to bring it to a stop? It seems to us that these examples show that there may be cases where there would be wilfulness although there was no direct or positive intention or design to inflict injury.

The authorities, from the earliest years of the common law, recognize the rule that there may be a wilful wrong without a direct design to do harm. This principle has been ap-

plied to furious driving, to collisions between vessels, to the taking of unruly animals into crowds, to carelessly laying out poison for rats, to want of caution towards drunken persons and to the careless casting of logs and the like upon highways. 1 Hale Pleas of the Crown (Am. ed.), 475, and authorities n. 4; 4 Blackst. Com. 182. Dr. Wharton gives full recognition to this principle and shows its application to railroads. Wharton Homicide, sections 80, 87, 94, 155. Mr. Bishop very fully and ably discusses the question and cites many authorities. In the course of his discussion he says: "There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not. Therefore carelessness is criminal; and, within limits, supplies the place of the direct criminal intent." 1 Bishop Crim. Law, chapter 20. In another place this author says: "If a man neglects obvious means to learn what will be the probable consequences of his act, and so proceeds rashly, the doctrine of carelessness already discussed applies to the case, and he is not excused." 1 Bishop Crim. Law, section 324. These authorities declare and illustrate a fundamental principle of the criminal law, long established and long maintained without dissent, and we can not affirm that where the question is one of mere civil liability a more lenient rule prevails in favor of the wrongdoer. Nor do the decided cases justify the conclusion that a more favorable rule prevails in civil cases.

Judge Cooley thus states the general rule: "Where the conduct of the defendant is wanton and wilful, or where it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts irrespective of the fault which placed the plaintiff in the way of such injury. The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or reck-

lessly injuring him. Even the criminal is not out of the protection of the law." Cooley Torts, 674.

Mr. Beach says: "It is a general rule that when the defendant's negligence is wilful, contributory negligence is not a defence, and, accordingly, it is held that a mere technical trespass is not such an offence as to deprive the trespasser of his right to recover damages for an injury which he suffers through the wilful negligence of another." Beach Con. Neg. 53. At another place this writer shows that the term "wilful negligence" is an inapt one, and takes substantially the same view as that adopted in *Terre Haute, etc., R. R. Co.* v. *Graham*, *supra*, saying that wilful negligence means a "failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another." Beach Con. Neg. 67.

The general principle asserted by the text-writers to whom we have referred is thus given expression in a work on railways: "The company has no right to inflict wanton injury on persons who are unlawfully on its location; and where human life and limb are concerned, that injury may well be treated as wanton, subjecting the company to damages, when, although able to do so, they neglect to arrest the engine which they have good reason to believe will, without an effort to stop it, result in injury to the wrongdoer. A wrongdoer is not necessarily an outlaw as to his property; still less as to his person." Pierce Railroads, 330.

It is probably true that the word wanton does not correctly express the meaning of the cases, but taken in connection with the context there can be no doubt as to the author's meaning, and that his statement of the rule is well supported by the authorities.

In *Donahoe* v. *Wabash, etc., R. W. Co.*, 83 Mo. 543, the principle asserted by the authors to whom we have referred was enforced in a case not unlike the present. In that case a child wandered upon the track and was killed. It was said

by the mother, in the course of her testimony, that "I made for my child as hard as I could run, with hands up and screaming. I ran as fast as I could." The company was held liable, because there was a recklessness that constituted something more than mere negligence. Our own cases recognize the doctrine that a reckless disregard of consequences may be so great as to imply a willingness to inflict an injury.

In *Pennsylvania Co.* v. *Sinclair, supra*, it was said: "Where an intention to commit the injury exists, whether that intention be actual or constructive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression." This is a recognition of the doctrine of the ancient authorities to which we have referred, for they assert the distinction between an actual and an implied or constructive intention.

"To constitute a wilful injury," said the court in *Louisville, etc., R. W. Co.* v. *Bryan, supra*, "the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."

In *Belt R. R. Co.* v. *Mann, supra*, it was said: "It is beyond question that to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury." Similar language is used in *Louisville, etc., R. W. Co.* v. *Ader, supra*.

These last cases distinctly recognize the rule that direct and positive intent is not always requisite to constitute a wilful act. If it were not so, what is said about a reckless disregard of probable consequences and a constructive intention would be meaningless.

In *Pennsylvania Company* v. *Sinclair*, *supra*, NIBLACK, J., speaking for the court, said: "As a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish wilfulness on the part of the defendant." *Cincinnati, etc., R. R. Co.* v. *Eaton*, 53 Ind. 307.

The general subject was thoroughly discussed in *Carter* v. *Louisville, etc., R. W. Co.*, 98 Ind. 552, and it was said that a trespasser is not an outlaw, and that a reckless aggression is not an act of mere negligence, but is an act "evincing a wanton indifference to consequences and willingness to inflict injury."

In *Indianapolis, etc., R. W. Co.* v. *McBrown*, 46 Ind. 229, horses were pursued by a train, driven into a deep cut and forced to leap a trestle-work, and the court said: "The pursuing them into the cut and forcing them to attempt a dangerous leap manifested a reckless disregard of human life, and the safety of the property of the citizen. The allegations of the complaint make out a plain and clear case of wilful negligence. The injury was intentionally and wilfully committed."

It is probably true that the language quoted is subject to verbal criticism, in this, that the term "wilful negligence" is not an appropriate one, but this misuse of words does not materially affect the decision.

We think it clear, from these cases, that it may be safely affirmed that it has never been denied by this court that there may be a wrong so great as to entitle a trespasser to recover, although there may be no direct or actual intent to inflict an injury.

The decision in *Terre Haute, etc., R. R. Co.* v. *Graham*, *supra*, does not decide that a direct or positive intention is necessary to constitute wilfulness, and nothing we here decide conflicts with that decision.

We agree with appellant's counsel, that if two men are

seen on a track in front of the train, and one of them risks his safety in the effort to signal the foremost man to leave the track, the engineer who sees the signal is guilty of a wilful wrong if he does not use ordinary care to stop the train. Pushing on in utter disregard of such warning signals is something more than negligence; it is wilfulness. It passes beyond a mere omission of duty and becomes a positive wrong. The fact that signals indicating peril are given and are seen by the engineer plainly distinguishes the case from the class of cases represented by the *Terre Haute, etc., R. R. Co.* v. *Graham, supra.* Proceeding in defiance of such signals creates the constructive intention of which our cases speak, and makes the conduct of the wrongdoer wilful. Such an act is not simply negligence; it is a wrong implying a willingness to inflict an injury.

While we agree with appellant's counsel upon the legal proposition as we have stated it, we can not agree in their inference of fact, for we can not assent to the conclusion that a jury might have inferred that the engineer saw the signals given by the father of the deceased. In the face of his positive statement that he did not see them this would be a forced and violent inference, and such inferences are forbidden. *Lake Shore, etc., R. W. Co.* v. *Foster, supra.*

There is no conflict of evidence, for the father testifies that he does not know whether the engineer saw his signals or not, and the engineer, speaking as the appellant's witness, positively testifies that he did not see them. We do not believe that the appellant has a right to ask the court to discredit his own witness in a case like this, where there is really no contradiction. If the appellant had not introduced the testimony of the engineer it might, perhaps, have been inferred that the engineer did see the signals, but the testimony was adduced by the appellant and must prevail because it is not contradicted. Where there is no contradictory evidence, and the testimony is not plainly improbable, it can not be disregarded. We think the fact that the

engineer so positively testifies that he did not see the signals is fatal to the appellant's position upon this branch of the case.

It matters not that the appellee's employees were negligent in running the train; the negligence of the deceased is an impassable barrier to a recovery on that ground. Whether the train was run at a furious rate of speed or not is immaterial, unless there was something making the rate of speed evidence of an intentional or wilful act. This is beyond controversy, and it can not be necessary at this day to cite authorities. The Illinois rule is not, and never has been, recognized in this State. From first to last our cases have opposed the doctrine of comparative negligence. Where a recovery is sought for an injury caused by negligence the plaintiff must establish a case of unmixed negligence or he will fail.

Decisions applicable to injuries received on a highway crossing do not apply to such a case as this, for both the traveller and the railroad company have a right to use the crossing; but the traveller has no right to use the track of the company at a place where there is no highway or crossing. The duty which the company owes to a traveller on a crossing or a highway is essentially different from the duty it owes to one trespassing on its track. In the one case there is a positive duty, in the other a mere negative duty not to wilfully do him harm. *Louisville, etc., R. W. Co.* v. *Phillips, ante*, p. 59; *Gaynor* v. *Old Colony, etc., R. W. Co., supra.*

If the place where the appellant's intestate was walking at the time he was struck was generally used by the public with the permission of the appellee, then he can not be regarded as a trespasser. *Louisville, etc., R. W. Co.* v. *Phillips, supra.*

Where a railroad company licenses the public to make use of its track in a city, town or village, it can not treat one who avails himself of the license as a trespasser. But it is not enough that persons do occasionally use the track, for, to constitute a license, it must appear, either expressly or by

clear implication, that the owner of the track authorized them to use it. We think the evidence in this case does not establish a license. If, however, we were wrong in this, still the appellant can not successfully complain of the action of the trial court in sustaining the demurrer. This is so, because the theory of the complaint is that the deceased was on the track of the company some distance from a public crossing, and there is no averment that the public was licensed to use the place where he was killed. The complaint is founded solely on the theory that the act of the appellee was a wilful wrong, and not on the ground that the deceased was on a part of the track which the company had licensed the public to travel over. If the complaint had shown that the deceased was where he might be without becoming a trespasser, a very different case would be presented. The theory of the complaint, however, is clearly that the deceased was wrongfully on the track, and was killed by an act implying a willingness to inflict the injury. On this theory the appellant must recover, or not recover at all. *Mescall* v. *Tully*, 91 Ind. 96, and cases cited; *Green* v. *Groves*, 109 Ind. 519, and cases cited; *First Nat'l Bank* v. *Root*, 107 Ind. 224.

Where evidence is incorporated, as it must be, in the demurrer, the only question presented, as we are inclined to think, is the sufficiency of the evidence to sustain a right of action, and exceptions to the rulings in rejecting or receiving evidence are not presented; but to present such exceptions there must be a proper bill of exceptions. If, however, the question on these rulings can be regarded as properly before us, the appellant can not have a reversal, because the rejected evidence, so far as it was material, bears entirely upon the question of a permissive use of the track, and was not, as appears from what we have already said, relevant to the issue tendered by the complaint.

Judgment affirmed.

Filed Nov. 15, 1887.

No. 12,491.

COWGER *v.* LAND.

SUPREME COURT.—*Verdict.—Will not be Disturbed When There is Evidence Sustaining it.*—Where the evidence fairly tends to sustain the verdict on every material point it will not be disturbed on appeal.

SAME.—*Instructions to Jury.—Considered Together.*—If the instructions given, when considered together, state the law correctly, as applicable to the issues and evidence, no available objection can be based thereon.

From the White Circuit Court.

W. E. Uhl, A. W. Reynolds and *E. B. Sellers*, for appellant.

R. Gregory, for appellee.

HOWK, J.—In this case, errors are assigned here by appellant, the plaintiff below, which call in question the overruling (1) of his demurrer to the fourth paragraph of appellee's cross-complaint, (2) of his demurrer to the fifth paragraph of such cross-complaint, and (3) of his motion for a new trial.

In his brief of this cause in this court, appellant's learned counsel has confined his arguments to such questions only as are presented by, or arise under, the alleged error of the court below in overruling appellant's motion for a new trial. In the outset of his brief, counsel says: "The case involves two suits in one—that of appellant against appellee on the complaint, and (2) that of appellee against appellant on the cross-complaint; and the issues joined in one case were very different from those in the other. Practically, the whole action was a success and a failure to both parties. For, while the verdict was in favor of appellee on the complaint, it was in effect for the appellant on the cross-complaint, and *vice versa*. But appellee has assigned no cross errors, and there is but one of the cases on appeal—that of appellant against appellee on the complaint and issue joined thereon, and I shall consider the evidence only with reference to its bearing on that branch of the case."

This is the view of appellant, as presented by his counsel, in relation to what is "on appeal" in this case. In this view, he is probably mistaken in regard to the extent of his appeal. The whole case and all the issues joined therein, as well on the cross-complaint as on his complaint, are brought before this court by his appeal herein. Of course, we consider such questions only as are presented by, or arise under, the errors assigned here by the appellant; but, in the decision of these questions, we explore the entire record, if necessary, in order to arrive at a right conclusion. Appellant may limit the questions to be considered here, by his assignment of errors, and he may, and under our practice will, waive the consideration and decision here of any question which he has failed to discuss in his brief of the cause. In the case in hand, appellant has wholly failed to notice even, in his brief herein, the errors assigned by him upon the overruling of his demurrers to the fourth and fifth paragraphs of appellee's cross-complaint; and, therefore, it must be held that he has practically waived such errors.

Appellant sued appellee in this action upon an open account for medical services rendered, and medicines furnished, by appellant to the wife of appellee at his special instance and request.

Appellee answered in three paragraphs, as follows: 1. A general denial of the complaint; 2. Payment; and 3. A set-off. Appellee also filed a cross-complaint in two paragraphs, numbered respectively 4th and 5th. In such fourth paragraph, appellee alleged that, on December 4th, 1882, appellant was a practicing physician and surgeon of White county, and as such he was called by appellee to attend Judith Land, appellee's wife, who was then sick, and was then and on divers days after that day, and before the filing of such paragraph, requested by appellee to administer the proper medicines and treatment for the cure of appellee's wife, Judith Land; that appellant, on the days aforesaid, as such physician and surgeon, undertook to administer medi-

cines to and treat Judith Land, appellee's wife; that appellant so negligently, unskilfully and unprofessionally managed and treated Judith Land that, by reason thereof, she became mortally sick in body, and, in great pain, lingered for, to wit, one year, and finally died; that, by reason of her treatment by appellant as aforesaid, appellee was put to the expense of, to wit, $1,000 in employing skilled physicians to cure her and nurses to take care of her; that by appellant's aforesaid acts, appellee was deprived, during all such sickness of his wife, of her society and services, and of all the benefit, pleasure and advantages which he otherwise would have enjoyed from her services and society; and that the services and medicines sued for herein by appellant were the same rendered and given by him under his employment as aforesaid. Wherefore appellee demanded judgment for $5,000, etc.

The fifth paragraph of cross-complaint differed from such fourth paragraph chiefly in that it was alleged therein that appellant undertook to treat appellee's wife, Judith Land, under his special contract to cure her for hire; that appellant did not cure appellee's wife; and that his treatment of her was so unskilful that he in fact killed her. Damages were claimed by appellee in the sum of $5,000, of which sum he offered to set off against appellant's claim herein an amount equal thereto, and demanded judgment for the residue, etc.

Appellant replied by general denial to the second and third paragraphs of answer, and he answered by a general denial of the cross-complaint herein. The issues joined were tried by a jury, and a verdict was returned for appellee, the defendant below; and, over appellant's motion for a new trial, the court adjudged that he take nothing by his suit, and that appellee recover his costs herein expended.

As appellant's counsel in his brief of this cause, as we have already seen, determined to "consider the evidence only with reference to its bearing" on the case of "appellant against

appellee on the complaint and issue joined thereon," which he claims to be the only "one of the cases on appeal," he had but little difficulty, of course, in finding, as he does, that "appellant was clearly entitled by the proof to a verdict for $266.50, and this conclusion is reached without any conflict in the evidence."

When the question of the sufficiency of the evidence to sustain the verdict is presented for our decision, we can not say, as appellant's counsel has said in his brief of this cause, that we will "consider only" the evidence offered by the one or the other party, or with reference to its bearing on certain issues, to the exclusion of the other issues in the cause. In the decision of this question we are required to consider all the evidence given in the cause, and its bearing on all the issues in the cause. Indeed, it has long been held by this court, that such question will neither be considered nor decided here unless it be affirmatively shown by the record that it contains all the evidence given in the cause. This rule is extended so far by our decisions that, even if the bill of exceptions containing the evidence concludes with the usual formula, "this was all the evidence given in the cause," yet, if it affirmatively appear that the bill does not contain all the evidence, this court will not consider and decide any question which depends for its proper decision upon the evidence. *French* v. *State, ex rel.*, 81 Ind. 151; *Fellenzer* v. *Van Valzah*, 95 Ind. 128; *Collins* v. *Collins*, 100 Ind. 266.

It will not do to say, as has been said in argument on behalf of appellant, that his case is the only case pending on appeal herein, and that the defendant's case is not before this court because appellee has assigned no cross errors." Why should appellee assign cross errors? The rulings of the trial court and the verdict of the jury were all in appellee's favor, and, so far as the record shows, he had no complaint to make "on appeal."

Appellant's counsel was probably mistaken when he said "the whole action was * * * * a failure to both parties;"

for it can hardly be said that it was a failure to appellee. True, he did not recover all the damages he demanded either in his counter-claim or second set-off; but, manifestly, the jury found enough damages in his favor to offset and completely extinguish appellant's demand against him herein, and that, perhaps, was all that he expected to recover on such counter-claim and set-off.

Upon the evidence in the record, we can not say that the verdict of the jury was not sustained thereby. Certainly, there is evidence in the record which fairly tends to sustain the verdict on every material point, and this, under our decisions, is sufficient.

Appellant's counsel also complains, very earnestly and at considerable length, of some of the court's instructions to the jury trying the cause. Counsel's objections to these instructions, however, chiefly apply to the omissions therein, rather than to the contents thereof; and most of such objections could, and no doubt would, have been obviated if appellant had asked for other and further instructions on the same subject.

We have carefully examined and considered all of the instructions in this case, and, without setting them out or commenting thereon, we may say generally that, taken and construed together, and with reference to each other, as they must be under our decisions, these instructions contain a fair and correct statement of the law, applicable alike to all the issues and all the evidence given in the cause.

We have found no error in the record.

The judgment is affirmed, with costs.

Filed May 12, 1887; petition for a rehearing overruled Dec. 30, 1887.

No. 13,053.

112 968
121 134

The Board of Commissioners of Dubois County v. Wertz.

Pleading.—*Claim Against County.—Formal Complaint Not Necessary.*—In presenting a claim against a county for allowance by the board of commissioners, no formal complaint is necessary; but a detailed statement of the items charged for, with the dates when necessary to their identification, is all that is required.

Inquest.—*Absence of Coroner.—Emergency.—Justice of Peace May Act.—Statute Construed.*—Where there is an emergency for holding an inquest over a dead body, and the coroner is, from any cause, so far out of the way as to be unable to reach the body and hold the inquest within a reasonable time, a justice of the peace of the county may hold it and perform all the duties of a coroner in connection therewith. Section 5888, R. S. 1881, construed.

Same.—*Post-Mortem Examination.—Compensation of Surgeon.—Charge Against County.*—A surgeon who, at the request of a justice of the peace, acting as coroner, makes a *post-mortem* examination of the body of a person whose death resulted from violence, is entitled to receive compensation for his services out of the county treasury.

Same.—*Estate of Deceased.—Rights of Widow.—Expenses of Inquest.*—Where no money or other valuables are found upon the body of the deceased, and he leaves an estate of less value than five hundred dollars, the statutory claim of the widow to the estate is superior to that of the county for the payment of the expenses of the inquest.

Same.—*Repeal of Statute.*—The statute appearing in the Revised Statutes of 1881 as section 5892 was repealed by the fee and salary act of 1875, and should not have been included in the revision.

From the Dubois Circuit Court.

O. A. Trippet, for appellant.

W. A. Traylor and *W. S. Hunter*, for appellee.

Niblack, J.—The proceedings complained of in this case were based upon an account filed against the county of Dubois by Toliver Wertz for making a *post-mortem* examination of the body of John E. Gardner, a person who had come to his death by violence, at the request of a justice of the peace, who was at the time acting, or assuming to act, as coroner of the county.

The board of commissioners rejected the claim. Wertz appealed to the circuit court, where a demurrer was first overruled to the complaint, and where there was a special finding of the facts as disclosed by the evidence. Upon the facts as thus found, the circuit court came to the conclusion that Wertz was entitled to an allowance against the county for the sum of twenty dollars, and rendered judgment accordingly. Questions were reserved, and are presented here, upon the sufficiency of the complaint, and upon the conclusion of law arrived at, as above, by the circuit court. The complaint, so called, consisted of an account simply charging that Dubois county was indebted to Wertz in the sum of twenty dollars for making a *post-mortem* examination of John E. Gardner by direction of Michael A. Sweeney, acting as coroner, on the 2d day of June, 1885.

We have frequently held in general terms, that, in presenting a claim against a county for allowance by the board of commissioners, no formal complaint is necessary; that a detailed statement of the items charged for, with the dates, when necessary to their proper identification, is all that is required. On that subject reference is made to the cases of *Board, etc.*, v. *Jennings*, 104 Ind. 108, and the other cases there cited, and *Stout* v. *Board, etc.*, 107 Ind. 343. Under the rule of practice thus recognized, the complaint in this case was sufficient.

Briefly stated, the circuit court specially found that, on the evening of the 1st day of June, 1885, one John E. Gardner, who was at the time acting as deputy sheriff of the county of Dubois, in an effort to arrest certain parties charged with crime, was shot by the parties so charged and thereby mortally wounded, from the effects of which shooting he died next morning at about four o'clock, at the town of Jasper, in said county; that, at the time of the death of Gardner, Maurice Fritz, the coroner of said county, resided at a distance of twelve miles from said town of Jasper, and as decomposition of Gardner's body had already set in, and

as no one volunteered his services to go for and notify the coroner, and as decomposition had so far advanced as to make the body offensive, and as to render an immediate inquest, if one should be held, necessary, one Michael A. Sweeney, a justice of the peace of said town of Jasper, proceeded, between eight and nine o'clock of the morning on which Gardner died, to hold an inquest upon the body in the absence of the coroner; that it was necessary to have a *post-mortem* examination to ascertain the cause and effect of the gun-shot wounds found in the body of the deceased; that the said Sweeney, while so acting as coroner, caused Wertz, who was a practicing physician and surgeon of said town in good standing, to be summoned before him, and required him, the said Wertz, to make a *post-mortem* examination of the body for the purpose stated, which he accordingly at once made; that the services thus rendered by Wertz were worth more than twenty dollars, and were, under the circumstances, appropriate and necessary services; that Gardner was, at the time of his death, a resident of the town of Jasper, and left an estate worth less than one hundred and fifty dollars, which was, by order of the proper court, set off to his widow without administration upon it; that the said Sweeney, as the acting coroner, certified the services of the said Wertz to the board of commissioners of the county on the 2d day of June, 1885, the day on which they were rendered; that Wertz had not received any pay for his services from any source; that at the time the inquest was held Fritz, the coroner, was at his home, twelve miles away, and might have attended and held the inquest if he had been notified in time, but to have so notified him and procured his attendance would have caused at least one-half day's additional delay.

Section 5878, R. S. 1881, is as follows: "Every coroner, as soon as he shall be notified that the dead body of any person supposed to have come to his death by violence or casualty is within his county, shall immediately proceed to in-

quire, upon view of the body, how and in what manner he came to his death."

Section 5879, continuing, provides that "All persons desirous of being heard shall be examined as witnesses; and the coroner may cause witnesses to be summoned by subpœna (issued by him, and served by a constable), who shall answer all questions asked them, on oath, touching such death. When a surgeon or physician is required to attend such inquest and make a *post-mortem* examination, the coroner shall certify such service to the board of county commissioners, who shall order the same paid out of the county treasury."

Section 5888 further provides that "In every case where the coroner shall be absent from the county or unable to attend, any justice of the peace of the proper county may hold an inquest over any dead body, and shall proceed in all respects as coroners are directed to do by the foregoing provisions; and shall, in all cases, be governed by the provisions and subject to the penalties of this act."

The first point made in support of the objection that the conclusion of law arrived at by the circuit court was not sustained by the finding of the facts is, that it was not made to appear that Fritz, the coroner, was unable to attend and hold an inquest over Gardner's body, within the meaning of section 5888, above set out, and that hence Sweeney had no power either to hold an inquest or to require Wertz to make a *post-mortem* examination of the body, as he assumed to do.

In respect to the provision of section 5888 referred to, we construe it as meaning that, when there is an emergency for holding an inquest over a dead body, and the coroner is, from any cause, so far out of the way as to be unable to reach the body, and to hold an inquest upon it, within a reasonable time, in view of the general condition of affairs attending the emergency, a justice of the peace of the proper county is

authorized to hold the inquest, and to perform all the duties of a coroner in connection with it. This construction is seemingly in harmony with, and receives a general support from, the case of *Stevens* v. *Board, etc.*, 46 Ind. 541.

The next objection to the sufficiency of the facts, as found, to sustain the claim is, that, construing sections 5879, 5882 and 5892 together, the services of Wertz primarily constitute a demand against the estate left by Gardner, and only a contingent claim against the county.

Under section 5882 it is only where money and other valuable things are found with the dead body that the property of the decedent may be appropriated to the payment of the expenses of the inquest, and in this case it was not shown that any money or other valuables were found with the body of Gardner, and the fair inference from all the facts, as set forth in the special finding, is that nothing of the kind was found with the body. Besides, as it was shown that Gardner left a widow, and an estate of less value than $500, which had been, presumably by proper proceedings, set off to the widow under the provisions of sections 2419, 2420, 2421 and 2422, R. S. 1881, we regard her claim to the estate as superior to that of the county for the payment of the expenses of the inquest. This is plainly inferable from section 2422, *supra*.

As to section 5892, it need only be stated that we held, in the case of *Pfaff* v. *State, ex rel.*, 94 Ind. 529, that it had been repealed by the fee and salary act, approved March 12th, 1875, and hence ought not to have been included in the Revised Statutes of 1881, and we still adhere to the conclusion then reached.

It follows that Sweeney had authority to require Wertz to make a *post-mortem* examination of the body of Gardner, and that from the facts, as found by the circuit court, Wertz became entitled to receive compensation for his services out of the county treasury. *Jameson* v. *Board, etc.*, 64 Ind. 524;

State, ex rel., v. *Board, etc.*, 85 Ind. 489; *Board, etc.*, v. *Jameson*, 86 Ind. 154; *Board, etc.*, v. *Bond*, 88 Ind. 102; *Board, etc.*, v. *Gillum*, 92 Ind. 511.

The judgment is affirmed, with costs.

Filed Nov. 15, 1887.

112 273
115 63
112 273
156 538
112 273
e165 560

No. 12,942.

112 273
e171 089

WILLIAMS v. JOHNSON.

EVIDENCE.—*Physician and Patient.—Confidential Matters.—Knowledge Gained by Professional Examination.*—A physician can not testify to the result of observations or examinations made by him upon the person of a patient, unless the patient consents, or in some way waives his privilege. Section 497, R. S. 1881.

From the Hamilton Circuit Court.

R. R. Stephenson, F. M. Trissal and *W. R. Fertig*, for appellant.

W. Garver, F. B. Pfaff, J. Stafford and *T. E. Boyd*, for appellee.

MITCHELL, J.—Emma C. Williams brought suit against Dempsey Johnson to recover damages for personal injuries alleged to have been sustained by her on account of the negligent failure of Johnson to observe the "law of the road," in consequence of which a collision occurred between their respective carriages while passing in opposite directions on a public highway.

The complaint is in two paragraphs, both of which are the same in legal effect. *Belt R. R. Co.* v. *Mann*, 107 Ind. 89.

There was a judgment for the defendant below. At the trial Mrs. Williams testified in her own behalf to the effect that she sustained bodily injuries, by being thrown from her carriage, and that she was attended by Dr. Herr, a practicing physician, who prescribed for injuries to her side and back.

The physician was not called to testify on behalf of the plaintiff below, but upon the conclusion of her testimony he was called as a witness on behalf of her adversary. He testified that he visited Mrs. Williams as a physician, and examined her, as his patient, in a professional capacity, and that such knowledge as he had of her condition and injuries was derived from an examination of her person, and from the statements made to him by Mrs. Williams at the time. The physician was permitted, after making the above disclosures, to testify, over objection from the plaintiff, that, at the time he examined her, he found no evidence that she had sustained any injury from a fall or other violence. The admission of this evidence was in violation of section 497, R. S. 1881, which declares that physicians shall be incompetent to testify "as to matter communicated to them, as such, by patients, in the course of their professional business."

The fact that the plaintiff had testified that she had sustained injuries, and that she called Dr. Herr, and that he had prescribed for her back and side, did not justify the admission of the evidence of the physician as to what he had or had not discovered as the result of an examination of the plaintiff's person. The statute sets the seal of secrecy and confidence upon what a physician observes in respect to the condition of his patient's person in the course of his professional examinations, as well as upon communications made to him by his patient. Accident or disease may compel the submission of one's person to examination by a physician, who thus acquires information which would be confided to no one else. The fear of disclosure often induces persons to suffer from bodily ailments, rather than submit to examination by persons of skill. The policy of the statute is to

protect, and render inviolable, the confidence which should exist between physician and patient. A physician is not permitted to disclose the result of observations or examinations made by him upon the person of his patient, unless with the consent of the latter, or unless the patient in some way waives his privilege. *Masonic Mutual, etc., Ass'n* v. *Beck*, 77 Ind. 203 (42 Am. R. 95); *Excelsior, etc., Ass'n* v. *Riddle*, 91 Ind. 84; *Penn Mutual Life Ins. Co.* v. *Wiler*, 100 Ind. 92 (50 Am. R. 769).

So far as disclosed by the record, Mrs. Williams had not testified to anything said to her by Dr. Herr as to what he discovered in the way of injuries upon her person. She testified that she had been injured, and that Dr. Herr prescribed for her side and back. She expressly declined to testify concerning any communications between herself and her physician, except as to the prescription for her injuries. Without asking to disprove the fact that the physician had prescribed for injuries to his patient's side and back, the court permitted him to testify, in behalf of her adversary, that, after a professional examination of her person, he had found no evidence that she had sustained any injury from a fall or other violence. It was error to admit the evidence.

Objection is made to the giving of certain instructions by the court, but as the evidence is not all in the record we can not say but that upon some theory, which the testimony may have supported, the instructions were correct.

For the error already pointed out the judgment is reversed, with costs.

Filed Nov. 15, 1887.

112 278
115 61
112 278
152 643
112 278
160 131

No. 11,856.

The Cincinnati, Indianapolis, St. Louis and Chicago Railway Company v. Lutes.

Measure of Damages.—*Breach of Contract.*—*Gains and Profits.*—A party who has been wrongfully deprived of the profits of an executory contract may recover, by way of damages, the difference between the amount he would have been entitled to on performance and the amount it would have cost him to perform the contract.

Same.—*Procurement of Other Work.*—*Reduction of Damages.*—*Burden of Proof.*—In such case the burden is upon the defendant to prove that the plaintiff could have procured other work, from which profits would have accrued, thereby preventing or reducing the damages for which he sues.

Practice.—*Witness.*—*Objection to Question.*—*Statement as to what Evidence is Expected.*—Where a question is propounded to a witness, to which an objection is sustained, the party introducing the witness must, to make the ruling available as error, state to the court what evidence he expects to elicit by the answer to the question.

Same.—*Instructions.*—*Making Part of Record.*—It is doubtful whether instructions to the jury are such papers as may, under section 650, R. S. 1881, be made a part of the record by an order of the court, or whether they can be brought into the record in any other manner than by bill of exceptions, or in the mode prescribed by section 535.

From the Marion Superior Court.

A. W. Hendricks, O. B. Hord, A. Baker and *E. Daniels*, for appellant.

F. Winter, for appellee.

Howk, J.—In this case, appellee Lutes sued the appellant in a complaint of two paragraphs. In the first paragraph of his complaint, appellee sued to recover damages for an alleged breach by the appellant of a parol contract between the appellee and appellant for the driving of certain piles at two bridges, known as numbers 5 and 6, on the line of its railroad, in that the appellant, after such contract was made and entered into, refused to permit appellee to perform such work.

The second paragraph of complaint was a common count

for work and labor done, materials furnished, and money laid out and expended by appellee for the appellant, at its special instance and request, as shown by the bill of particulars therewith filed and made part thereof, etc.

Appellant answered in three paragraphs, of which the first was a general denial of appellee's complaint, and in the second and third paragraphs of its answer appellant pleaded specially that, on account of appellee's failure to comply therewith, the appellant had rescinded such contract.

Appellee replied by a general denial of the matters alleged in the second and third paragraphs of appellant's answer.

The issues joined were tried by a jury, and a verdict was returned for appellee, assessing his damages in the sum of $1,655; and, over appellant's motion for a new trial, judgment was rendered on the verdict. On appeal, the judgment of the court at special term was, in all things, affirmed by the general term; and from the judgment of the general term this appeal is now here prosecuted.

A number of errors were assigned by appellant in general term, all of which are presented here by a proper assignment of error. In their brief of this cause, appellant's learned counsel have, however, presented and discussed such questions only as arise under the alleged error of the court, at special term, in overruling appellant's motion for a new trial. In such motion, a large number of causes were assigned for such new trial, consisting, chiefly, of alleged errors of law occurring at the trial in the admission or exclusion of offered evidence, and in the giving or refusal of instructions. We will confine this opinion to the consideration of such only of these alleged errors of law so occurring as appellant's counsel have complained of here in argument, and to the decision of the questions thereby presented.

On the trial of the cause, the appellee, as a witness in his own behalf, on his examination in chief, testified that it would have cost him about 12½ cents per foot to put down the piles at bridges 5 and 6; "that would have been the

actual cost." On his cross-examination, in answer to questions propounded to him by appellant's counsel, appellee further testified as follows:

"Q. You have said you could drive the piles for 12½ cents a foot? Ans. Yes, sir.

"Q. Will you be kind enough to tell me what the expense would have been incident to driving those piles? Please enter into all the details and tell me just exactly what this expense would have been? Ans. Well, my brother's expense would have been $5 a day; I was paying him $125 a month; I was paying Vorhis $2.50 a day, I think; I will not say for certain; and Mr. Hutton either $2.50 or $2.25; I don't know about these little things; the teams, I think, we were paying $4 a day to.

"Q. How many teams had you? Ans. We ran two teams, with a driver.

"Q. Did $2.50 cover the time of a driver? Ans. I said $4 a day for each team.

"Q. Now, what else? Ans. Now, there would be about two laborers with them.

"Q. What would they cost you? Ans. They would be about $1.50 a day.

"Q. That would be all the labor? Ans. Yes, sir; that would constitute a gang."

After appellee had rested his case in chief, and appellant had begun the introduction of evidence in its defence herein, one Jacob Confer was called by appellant as a witness in its behalf, and, on his examination in chief, testified that he had been engaged in the business of bridge-building and pile-driving for seventeen years, and had built the "bridge No. 6," on the line of appellant's railroad, mentioned in appellee's complaint, and had experience in all kinds of pile-driving; that the work at said "bridge No. 6" was superintended by his partner in the business, Mr. Clay; and that he had eight hands employed. In the further examination

in chief of the witness Confer, appellant's counsel propounded to him the following questions:

"Q. 40. Now, what wages were paid by you to those other persons who were at work, and please tell whether it was, or was not, a reasonable compensation?

"Q. 41. Please tell, now, whether the wages you paid your employees there were, or were not, the usual and customary wages at that time and place, for that character of work, or otherwise?

"Q. 42. Please tell what the aggregate cost of the labor per day to you was at that bridge, and also state whether the expenditure was, or was not, the reasonable and customary cost for labor at that time and place, for that kind of work?

"Q. 43. Now, I will ask you to state, how the expense of driving those piles with the steam power that you had would compare with the driving of the same piles with horse-power?"

To each of the foregoing questions, as it was propounded, appellee objected at the time, on the ground that it was "incompetent, irrelevant and immaterial." The court sustained the objections, and appellant excepted. These rulings are the first errors complained of here by the appellant's counsel in their brief of this cause.

If the trial court had overruled appellee's objections to the questions last quoted, and permitted the witness to answer each and all of them, it is certain that appellee could not be heard to complain here of such rulings as erroneous. This is so because, under our decisions, appellee's objections to such questions were not sufficiently specific to present any available questions for our decision. *Stanley* v. *Sutherland*, 54 Ind. 339; *Louisville, etc., R. W. Co.* v. *Falvey*, 104 Ind. 409; *Byard* v. *Harkrider*, 108 Ind. 376.

But the trial court sustained appellee's objections to each of the questions quoted, and refused to allow the witness to answer them. These are the rulings of which appellant's counsel complain here as erroneous. The record fails to show,

however, that the appellant or its counsel, when such questions were objected to, informed the trial court what evidence it was expected to elicit by the answers to such questions, or either of them.

It has long been settled by the decisions of this court, that where a question is propounded to a witness, and the trial court sustains an objection thereto, the party can not, by simply saving an exception to the ruling, get available error into the record on the ground of the exclusion of competent evidence. In such a case the party must state to the court what the evidence is which he offers and expects to elicit by the answer of the witness to the question propounded and objected to. *Graeter* v. *Williams*, 55 Ind. 461; *Mitchell* v. *Chambers*, 55 Ind. 289; *Bake* v. *Smiley*, 84 Ind. 212; *Louisville, etc., R. W. Co.* v. *Smith*, 91 Ind. 119. This rule of practice is a reasonable one, and is well sustained by our decided cases. *Elliott* v. *Russell*, 92 Ind. 526.

It is manifest, therefore, that it would be unavailing and unprofitable for us to attempt to decide whether or not the evidence which appellant apparently expected to elicit by the answers of the witness to the questions quoted would have been competent, material and relevant. The question is not properly presented for our decision by the record of this cause, and, if we should attempt to decide it, all that we would or could say in relation to the question would be at most mere *dictum*. We decline the attempt.

Appellant's counsel next insist that the trial court erred in sustaining appellee's objection to the following question propounded by appellant to Jacob Rubush, a witness on its behalf, in his examination in chief, namely: "I will ask you to state whether his (William A. Lutes') manner, in his conversation with you there, and as to your suggestions, was courteous."

It is shown by the record that appellee objected to this question "as incompetent, irrelevant and immaterial, and as asking for a conclusion of the witness." The court sustained

the objection, and appellant excepted. Here, again, the appellant and its counsel failed to state to the trial court what the evidence was which it was expected to elicit by the answer of the witness to the question last quoted. Under our cases heretofore cited herein, appellant is not in a condition to complain here of the sustaining of appellee's objection to its question to its witness Jacob Rubush.

Finally, it is claimed by appellant's counsel that the trial court erred in the instruction given of its own motion, in the event the jury found for the appellee, upon the question in relation to the measure of his damages.

Upon this subject the court instructed the jury as follows: "The general rule as to the measure of damages applicable here, if the plaintiff is entitled to recover at all, is this:

"The party who has been wrongfully deprived of the gains and profits of an executory contract may recover as an equivalent, and by way of damages, the difference between the contract price—the amount which he would have earned and been entitled to recover on performance—and the amount which it would have cost him to perform the contract. In estimating such cost, allowance must be made for every item of cost and expense necessarily attending a full compliance on his part; and, in estimating his profits, you will, of course, exclude all such as are merely speculative and conjectural."

The trial court gave the jury no other instruction in reference to the measure of appellee's damages, in the event of his recovery herein; and neither appellant nor appellee asked the court for any further or additional instructions on the subject of the instruction quoted, so far as the record shows. Not only so, but the record wholly fails to show in any manner, so far as we can find, that appellant excepted at the time either to the instruction quoted or to any other instruction given by the court of its own motion or at appellee's request. The instructions asked by appellee are not copied in the record, nor is it shown whether they were given or refused

by the court; but, as to these instructions, all that is shown by the transcript before us is that they were "not on file."

The instructions asked by appellant were all refused by the court, and were copied by the clerk below in the transcript now before us; but these instructions were not made a part of the record of this cause in any manner known to our law. The instructions given by the court of its own motion are copied at length in the transcript before us; and then follows an order of the court "that all instructions asked and given herein be made a part of the record in this cause." But it may well be doubted, as it seems to us, if the instructions of the court are such papers as may, under the provisions of section 650, R. S. 1881, be made a part of the record by "an order of the court," in any case; or whether the instructions can be made a part of the record in any other manner than by bill of exceptions, or in the mode prescribed in and by section 535, R. S. 1881. *Childress* v. *Callender*, 108 Ind. 394.

If it be conceded, however, that this order of the court is sufficiently broad and comprehensive to include within its terms all instructions given by the court of its own motion, and not asked for by either party, then, but not otherwise, these latter instructions were properly made a part of the record of this cause. But, even if this much be conceded, it is certain, we think, that this order does not show, nor is it elsewhere shown in the record before us, that appellant excepted at the time to the giving of the instruction above quoted, or any of the instructions given by the trial court of its own motion or at appellee's request. It follows, therefore, that appellant is in no condition to complain here of the supposed error of the trial court in giving of its own motion the instruction above quoted. But if it were otherwise—if the supposed error of the court, in giving such instruction, were properly saved in and presented by the record before us—we are clearly of the opinion that the instruction above quoted correctly stated the rule for the measure of appellee's damages, in the event of his recovery, applicable alike to the

issues in this cause and to the case made by the evidence herein. This is settled, we think, not alone by the decided cases in our own reports, but also by the decisions of the courts of last resort in several of our sister States. *Dunn* v. *Johnson*, 33 Ind. 54 (5 Am. R. 177); *Hadley* v. *Prather*, 64 Ind. 137; *Fairfield* v. *Jeffreys*, 68 Ind. 578; *Fox* v. *Harding*, 7 Cush. 516; *Cunningham* v. *Dorsey*, 6 Cal. 19; *Cassidy* v. *Le Fevre*, 45 N. Y. 562; *Devlin* v. *Mayor*, *etc.*, 63 N. Y. 8.

It is no doubt true, as claimed by appellant's counsel, that the general rule for the measure of the plaintiff's damages, in such a suit as this, as stated in the court's instruction above quoted, is subject to this modification, in a proper case, to be shown by the defendant, namely: That if the plaintiff could have procured other work, from which profits would have accrued, such profits should have been deducted from his estimated damages. "The burden of proving that the damages which have been sustained in such cases could have been prevented, unquestionably rests upon the party guilty of the breach of contract." *Hamilton* v. *McPherson*, 28 N. Y. 72; *Costigan* v. *Mohawk*, *etc.*, *R. R. Co.*, 2 Denio, 609; *Dunn* v. *Johnson*, *supra*. In the case in hand, the defendant below did not show by its evidence that the plaintiff herein could have procured other work, from which profits would have accrued. No basis was shown, therefore, for any modification of the rule for the measure of appellee's damages herein, as stated in the court's instruction above quoted; and, besides, it does not appear that appellant asked the trial court to modify such rule, in the respect mentioned or in any other respect.

We have found no error, in the record of this cause, which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed May 10, 1887.

ON PETITION FOR A REHEARING.

HOWK, J.—Appellant asks a rehearing in this case, as we understand its learned counsel, not so much on account of what is decided in our former opinion, as on account of what, as counsel claim, we then failed to decide. It is shown by the record of this cause that, on the trial thereof, while appellee was on the stand as a witness, he was asked by appellant, on cross-examination, the following questions, namely:

1. "What was this work you were doing at East St. Louis?"

2. "What were you doing out there at East St. Louis?"

Objections were made, on behalf of appellee, to his answering each of these questions, when appellant's counsel stated to the court that they offered to prove, by the answer to the first question, that with the same pile-driver and crew appellee, immediately upon quitting the ground at bridge 6, went to work at East St. Louis, and continued there for sixty days at work, with the same crew; and by the answer to the second question, that appellee made the same profit at East St. Louis that he would have made if he had continued at work on bridge 6. Appellee's objections to each of such questions were sustained by the court, and appellant excepted, and assigned such rulings as causes nine and ten in its motion for a new trial. It is true, as appellant's counsel claim, that we did not in terms notice these rulings in our original opinion; but we showed then, we think, that there was no error in either of these rulings by holding, as we did, that the burden was on the defendant to prove that plaintiff could have procured, or did procure, other work from which profits would have accrued, or did accrue, which profits ought to be deducted from the estimated damages. In other words, the proof of such profits was a part of the defence, to be introduced at the proper time. It is apparent, we think, from the examination in chief of appellee as a witness, that

the questions above quoted, propounded to him by appellant, were not competent or legitimate on cross-examination; and it was on this ground, we doubt not, that the learned trial court sustained the objections to each of such questions. There was no error in either of such rulings.

The petition for a rehearing is overruled, with costs.

Filed Dec. 30, 1887.

No. 12,979.

MOHN *v.* MOHN.

TRUST.—*Parol.*—*Real Estate.*—*Proceeds of Sale.*—An express trust in land can not be established by parol; but a parol agreement to hold the proceeds of a sale of the land in trust for another is valid, if upon a sufficient consideration.

SAME.—*Consideration.*—*Equitable Obligation.*—Such an equitable obligation arises out of an agreement of a grantee to hold the land in trust for the grantor as constitutes a sufficient consideration for a subsequent agreement to hold the proceeds of a sale of the property in trust for such grantor.

From the Huntington Circuit Court.

J. M. Hiltebrand and *G. W. Stults*, for appellant.

J. B. Kenner, for appellee.

ZOLLARS, C. J.—Appellant has assigned as error the sustaining of a demurrer to his complaint.

In the first paragraph the following are stated as facts: Appellant was the owner of a tract of land. Appellee requested him to convey it to a third person in order that it might be conveyed to her. At the same time she agreed that if he would do so she would hold the land in trust for him,

and that, if it should be sold by her, she would hold the proceeds in trust for him. Relying upon that agreement, which was in parol, appellant conveyed the land to the designated third person, and caused him to convey it to appellee. She afterwards sold it, and refused, and still refuses, to account for the proceeds. A personal judgment is sought for the amount realized from the sale.

Why the land was conveyed to appellee through a third person instead of direct from appellant does not appear. No trust was declared in any of the deeds of conveyance. Very clearly, to our minds, the paragraph of complaint under consideration must be regarded as an attempt to establish an express trust in land by parol. That can not be done. *Mescall* v. *Tully*, 91 Ind. 96.

If, in addition to the facts alleged, there had been the further allegation that, after the sale of the land by appellee, she agreed to hold the proceeds in trust for appellant, we should have a case within the ruling in the case of *Calder* v. *Moran*, 49 Mich. 14.

Upon such a state of facts, under the ruling in that case, appellant might recover.

The money received for the land is personal property. A trust in personal property may be created and established by parol.

The second paragraph of the complaint is, in substance, the same as the first, except that it does not contain the averment that, at the time appellee agreed to hold the land in trust, she also agreed that in the event of a sale she would hold the proceeds in trust for appellant; and except the additional averment that, after she had received her deed for the land, she requested appellant to join with her in a deed of conveyance to the person to whom she had sold the land, and agreed that if he would do so she would hold the proceeds in trust for him, etc.

We know of no reason why this latter agreement may not

be enforced, if it is supported by a sufficient consideration. See *Hon* v. *Hon*, 70 Ind. 135.

As we have already determined, in a legal point of view appellee held and owned the land absolutely and free from any trust. From the whole transaction, as stated in the complaint, there is ground for conjecturing that the parties were husband and wife, but there is no averment directly or indirectly that they were. That they were, is not claimed in the briefs. For aught that is made to appear, there was no necessity at all for appellant to join with appellee in the deed to her vendee. For aught that is made to appear, she could have conveyed the title to the land just as well and just as effectually without his signature as with it. And, for aught that is made to appear, his joining in the deed would neither injure nor benefit either party.

The agreement of appellee to hold the proceeds of the sale in trust for appellant was, therefore, without consideration, unless it be said that there was an equitable obligation arising out of the original agreement to hold the land and the proceeds of the sale of it in trust, and that that equitable obligation may be treated as a sufficient consideration. See *Waldron* v. *Sanders*, 85 Ind. 270; *Buchanan* v. *Lee*, 69 Ind. 117; *Westerfield* v. *Kimmer*, 82 Ind. 365.

Regarding the averments of the complaint as true, as the demurrer admits them to be, we think that there was such an equitable obligation on the part of appellee, and that that obligation was a sufficient consideration to support the agreement by her to hold the proceeds of the sale in trust for appellant. In that conclusion we are fully supported by the case of *Calder* v. *Moran*, *supra*. See, also, *Wills* v. *Ross*, 77 Ind. 1 (40 Am. R. 279); *Post* v. *Losey*, 111 Ind. 74.

Our conclusion renders it necessary to reverse the judgment, with costs, and to remand the cause, with instruction to the court below to overrule the demurrer to the second paragraph of the complaint.

Filed Nov. 15, 1887.

112 288
121 449
112 [illegible]
135 [illegible]
112 288
144 60
112 288
159 391
112 288
162 630

No. 12,990.

FLEENER ET AL. v. CLAMAN, TREASURER.

INJUNCTION.—*Free Gravel Road.—Insufficient Petition.—Void Proceedings.—Collection of Tax.*—A complaint to restrain the collection of a tax, levied for the construction of a free gravel road, which alleges that, on appeal by certain land-owners from the order of the board of commissioners levying the tax, the circuit court adjudged that the petition for the tax was not signed by a majority of the land-owners within two miles of the proposed road, and that the proceedings of the board thereon were void, is good.

SAME.—*Estoppel.—Facts Constituting Must be Pleaded.*—If facts constituting an estoppel exist they must be pleaded.

From the Monroe Circuit Court.

J. R. East, W. H. East, R. A. Fulk, E. Corr and *M. M. Dunlap*, for appellants.

W. P. Rogers, J. E. Henley and *J. H. Louden*, for appellee.

ELLIOTT, J.—The appellants, by their complaint, seek to restrain the collection of a tax levied for the construction of a free gravel road. The complaint, among other things, alleges that, within thirty days from the time the board of commissioners rendered a judgment levying the tax, two of the property-owners, Weimer and Fleming, appealed to the circuit court, and that the circuit court adjudged that the petition for the tax was not signed by a majority of the land-owners within two miles of the proposed road, and set aside, annulled and declared void the order of the board of commissioners, and all proceedings subsequent thereto, as to said Weimer and Fleming.

This allegation makes the complaint good. If the order of the board was declared void, no rights could be founded on it. If it never had any validity, as the complaint avers and the demurrer admits, all subsequent proceedings must go down with the fall of the order which alone could give them validity. The averment of the complaint shows that the

order was void for want of jurisdiction, and not merely erroneous because of an irregularity. We can not conceive how a board of commissioners can rightfully proceed upon a void order.

It is to be observed that the judgment of the circuit court does not vacate the proceedings because of an error affecting only the parties appealing, but that it annuls the order of the board for the reason that there was not such a petition as the law requires. That judgment, therefore, goes to the very foundation of the proceedings. The case is not, for this reason, within section 5102 of the Revised Statutes.

If facts constituting an estoppel exist they must be pleaded. *Peters* v. *Griffee*, 108 Ind. 121. No such facts appear in the complaint.

Judgment reversed.

Filed Nov. 16, 1887.

119	289
118	399
118	398
112	289
125	453
126	508
119	289
130	424
112	289
145	521
112	289
154	29
154	321

No. 12,676.

Palmer v. Hayes.

Statute of Limitations.—*Satisfaction of Judgment.*—The six years statute of limitations is no defence to a suit to obtain the satisfaction of record of a judgment.

Practice.—*Insufficient Answer.*—*Defective Demurrer.*—*Harmless Error.*—There is no available error in sustaining a defective demurrer to a bad answer.

Pleading.—*Departure.*—*Former Adjudication.*—*Chattel Mortgage.*—*Satisfaction of Judgment.*—A complaint to obtain the satisfaction of a judgment alleged that the judgment creditor had accepted personal property for the amount of the judgment but refused to cancel it. An answer alleged that, in a former action between the same parties, it was ad-

judged that such personal property was, at the time it was taken, the property of the judgment creditor by virtue of a chattel mortgage executed by the judgment debtor. The reply admitted the judgment, but alleged that it was rendered upon the agreement that, in consideration of the judgment and the surrender of the mortgaged property, the judgment should be satisfied and cancelled.

Held, that the reply is not a departure from the complaint and is sufficient.

FORMER ADJUDICATION.—*Nominal Party.—Judgment Conclusive Upon Real Party.—Evidence.*—One who, being the real party in interest, prosecutes an action in the name of another, is concluded by the judgment rendered therein, and in a subsequent action by him for the same cause it is error to exclude evidence showing his relation to the former proceeding.

From the Whitley Circuit Court.

T. R. Marshall, W. F. McNagny and *C. Clemans*, for appellant.

A. G. Wood, for appellee.

MITCHELL, J.—This was a proceeding by Hayes against Palmer to obtain satisfaction of a judgment on a justice's docket, pursuant to the provisions of section 1497, R. S. 1881.

Hayes alleged that Palmer had recovered a judgment against him before a justice of the peace for $238.60, and that the judgment had been paid by the sale and delivery of certain personal property, which the judgment creditor had accepted in satisfaction thereof, but that the latter wrongfully refused to cancel the judgment of record.

The defendant answered a former adjudication, alleging that it had been adjudged, in a certain action between the same parties, that the property alleged to have been taken in satisfaction of the judgment was, at the time it was taken, the property of Palmer, under and by virtue of a certain chattel mortgage theretofore executed by Hayes to Palmer. The six years statute of limitations was also pleaded. The court sustained a demurrer to this last answer. This ruling is complained of. If the judgment was in fact satisfied, as

was alleged in the complaint, it was no answer that satisfaction had been made more than six years before the bringing of the suit.

It is argued that the demurrer to this answer was insufficient in form, and that it should have been overruled for that reason. If it should be conceded that the demurrer was informal, it would not follow that the ruling should be reversed on that account. The most that can be said is that a bad answer went out of the record upon an informal demurrer; or, in other words, that the court reached a correct conclusion in a manner not altogether formal.

To the answer of former adjudication, the plaintiff replied, admitting the judgment, but alleging that it had been rendered upon the express agreement that Palmer was to be adjudged the owner of the property covered by the chattel mortgage mentioned, and that, in consideration of such judgment, and the surrender to him of the property mortgaged, he agreed to cancel and satisfy the judgment mentioned in the complaint.

It is contended that this reply was a departure from the complaint. We do not concur in this view. The substance of the answer is that Hayes had an equity of redemption in certain personal property, upon which Palmer held a chattel mortgage, and that, in consideration that the latter agreed to satisfy the judgment in question, the former sold his right in the property mortgaged, and agreed that Palmer should be adjudged the absolute owner thereof. This was not a departure from the complaint.

The point most sharply contested at the trial was whether, by the agreement relied on, the mortgaged property was to be taken by Palmer at its appraised value, and credit given on the mortgage debt, including the judgment in question, for the sum at which the property should thereafter be appraised; or whether the property was to be taken, and the indebtedness cancelled, without regard to the appraised value of the property. If the question here depended upon the

preponderance of the evidence, we might incline to the view that the case was with the appellant; but, as there is evidence in the record which tends to sustain the finding, we can not disturb the judgment upon what might seem to us the preponderance of evidence.

It appeared that certain persons had become replevin bail for the stay of execution on the judgment of which an entry of satisfaction was sought to be obtained. Prior to the commencement of this suit by Hayes, a suit had been commenced by, or in the name of, the replevin bail, for the purpose of obtaining an entry of satisfaction of the identical judgment involved in this proceeding, upon the same grounds as those alleged in the complaint in this case. This suit had been prosecuted to judgment against the replevin bail. Palmer offered the pleadings, proceedings and judgment in that case in evidence at the trial below. He offered to prove, in that connection, that Hayes employed counsel, and to all intents and purposes prosecuted the former suit, at his own cost, in the names of the replevin bail, they being merely nominal parties. This evidence was excluded. This was error. If it was true, as the appellant proposed to prove, that in the former suit Hayes was the real party, and that he personally conducted the suit, in the names of the replevin bail, under an agreement to pay all the expenses and costs, then he was so far in privity with the nominal parties, with whom he was identified in interest, as to be concluded by the judgment. "The fact that an action is conducted in the 'names of nominal parties, can not divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the questions; and who are estopped by the previous decision.'" Freeman Judg., section 174. *Montgomery* v. *Vickery*, 110 Ind. 211; *Stoddard* v. *Thompson*, 31 Iowa, 80; *Elliott* v. *Hayden*, 104 Mass. 180; *Train* v. *Gold*, 5 Pick. 380. "There are," said COWEN, J., in *Jackson* v. *Griswold*, 4 Hill, 522, 530, "certainly many cases where a

person, though not a nominal party to the suit, shall yet be concluded by it, because he has in fact taken the management of the cause; nay, where he has had notice of its pendency, and a chance to litigate, but neglected to do so."

It would present an anomaly, indeed, if, after prosecuting a suit in the names of the replevin bail, with the result that it was therein solemnly adjudged that they were bound for the judgment, the principal debtor might now have it adjudged that, as to him, the judgment was satisfied.

For the error in excluding the evidence last alluded to, the judgment is reversed, with costs.

Filed Nov. 16, 1887.

112 293
130 202
112 293
166 504

No. 12,946.

Snyder *v.* Click.

Guaranty.—*Execution.*—*Delivery.*—*Estoppel.*—One who signs an instrument guaranteeing the performance of a contract by another, and leaves it in the custody of the latter, is estopped to deny that he authorized such person to deliver the instrument to the guarantee.

Same.—*Notice of Acceptance.*—*When Not Necessary.*—Where the guaranty is direct and certain, and the thing guaranteed is definite in its amount and known to the guarantor, or ascertainable by the exercise of ordinary care at the time the guaranty is given, notice of acceptance is not necessary to bind the guarantor.

Same.—*Performance of Consideration.*—Where the guarantee accepts the guaranty, and, acting upon the faith of it, performs the consideration upon which it rests, the contract is complete and enforceable.

Same.—*Notice of Default.*—*Damages.*—*Matters of Defence.*—*Justice of Peace.*—*Burden of Proof.*—The failure to give the guarantor notice of default, and the resulting damages, are matters of defence; but if the action on the guaranty is brought before a justice of the peace, such matters may

be given in evidence without plea, the burden being on the defendant to sustain them by a preponderance of the evidence.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.

H. C. Dodge, for appellee.

HOWK, J.—In this case, appellant Snyder was plaintiff and appellee Click and one John Chisnell were defendants in the court below. In his complaint, appellant alleged that, on the 3d day of February, 1881, he, by a written lease, a copy of which was therewith filed, demised and let to one William S. Delaney a certain mill at and for the rental of $187.50, payable each six months; that as a part of the consideration of such demise, and before and at the time of the execution of said lease, the defendants endorsed on said written lease, and executed their written guaranty, as follows: "We, the undersigned, guarantee the fulfilment of the within contract, January —, 1881;" that, by virtue of said written lease and such guaranty thereon, appellant delivered the possession of the demised premises to the lessee, Delaney, who held and occupied the same until he died in December, 1883, at which time the sum of $175 of rent was due, under and by virtue of the terms of said lease, and was yet unpaid. Wherefore, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee, and judgment was rendered accordingly. Appellant's motion for a new trial having been overruled, he has appealed from the judgment below to this court, and has here assigned, as error, the overruling of his motion for a new trial. In this motion, the only causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

On the trial, the evidence offered by appellant was agreed to in writing by the parties, substantially as follows: "The written instrument, and guaranty thereon, sued upon in this

action, were written up as they now appear in the copy filed with the complaint, except that neither the lease nor the guaranty thereon was signed by any one. When so written up, Snyder gave it to Delaney to get a guaranty for the rent, and Delaney took it to defendants, Click and Chisnell, who executed the guaranty thereon as it now appears, and gave it to Delaney. Defendant Click did not read said lease before signing, and did not in fact know its contents; and said Click executed said guaranty in no other manner than by signing his name thereto and delivering it to said Delaney. Delaney took it to Snyder, who refused to receive it until he had investigated the responsibility of Click and Chisnell; but after so doing, and becoming satisfied with the responsibility of Click, Snyder received the same, and then he and Delaney signed said lease as it now appears, and said lease was delivered by Delaney to Snyder, and by virtue thereof said Snyder delivered the possession of the premises described in said lease to said Delaney; and said Delaney continued in possession under said lease until some time during the fall of 1883, when he removed therefrom, leaving the sum of $169.77 rent due and unpaid. Said Click never authorized said Delaney or any other person to deliver said guaranty to said Snyder, other than as such authority to deliver might be inferred from signing the same and leaving it in the possession of Delaney. Said Aaron Click had no notice of the acceptance of said lease, or acceptance of defendants as guaranty for Delaney, nor of any default, until just prior to the commencement of this suit, when a demand for payment was made on him in the city of Elkhart, Indiana, by the attorney of plaintiff."

Appellee gave in evidence the facts elicited by appellant's answers to certain interrogatories, propounded to him by appellee, in substance as follows:

William Delaney did not, on the — day of October, or November or December, 1883, after the sum of money appellant demanded in this suit was due, offer him in money

$93.87 to apply upon said demand. William Delaney did not, at the time mentioned in the last sentence, or at any other time, offer to pay appellant any sum of money to apply upon the demand in suit, and appellant did not refuse any money offered him by William Delaney. During the month of October, 1883, Delaney called appellant into his house, and said that he would pay appellant for three months rent if the latter would give him a receipt in full of all demands against him. Appellant told Delaney he could not do that, and then Delaney said he would not pay any; he never offered to pay appellant anything to apply upon what was due him. Appellant demanded the money due him from Delaney some time in November, 1883, and he said he had no money for appellant; he sued Delaney, but the latter died before appellant could get judgment, and he had to dismiss his suit; he never tried to collect the amount in suit out of the estate of Delaney, because the latter never had any estate. Delaney lived just three months after the money sued for was due, and his estate was insolvent.

It is shown by a bill of exceptions, properly in the record, that the foregoing was all the evidence given in the cause. The question presented for our decision, and the only question, is this: Does the evidence sustain, or even tend to sustain, the finding of the trial court, on every material point? We are of opinion that this question must be answered in the negative.

Appellee's execution of the written guaranty was put in issue by his verified plea in denial thereof. The evidence in the record shows clearly and conclusively, to our minds, that the written contract of guaranty declared upon in this cause was duly executed by appellee and his co-defendant, Chisnell, and it does not appear that any evidence was offered or introduced by appellee in support of his verified plea herein. Certainly, the agreed facts given in evidence, that "defendant Click did not read the lease, and did not in fact know its contents, before signing" the guaranty in suit, did not

prove, nor tend to prove, that he did not execute such guaranty. Having signed his name to such guaranty at the request of Delaney, and entrusted him with the custody thereof, appellee can not be heard to claim that he never authorized Delaney to deliver such instrument to the appellant, Snyder.

But it is claimed on behalf of appellee that, although he had signed such written guaranty, and had, by his conduct, estopped himself from denying that he had authorized Delaney to deliver such instrument to appellant, and although the evidence showed that, pursuant to such authority, Delaney had in fact delivered such guaranty to appellant, yet such instrument never became a contract binding on the appellee, because the evidence failed to show that he had been notified by appellant of his acceptance of such guaranty.

This claim of appellee is vigorously urged here in argument by his counsel, and he cites some authorities which seem to support such claim. But, whatever may be the law elsewhere, it is firmly settled by our decisions that where, as here, the guaranty is direct and certain, and the thing guaranteed is definite in its amount and known to the guarantor, or might have been known to him, by the exercise of ordinary care, at the time the guaranty was given, notice of the acceptance of such guaranty need not have been given in order to render it binding on the guarantor. Appellee's contract was not a mere overture or proposition to guaranty; but it was what has been called a conclusive guaranty, and no notice of its acceptance was necessary. *Jackson* v. *Yandes*, 7 Blackf. 526.

Under the evidence in this cause appellee's guaranty was fully executed by the delivery thereof, by his authority, contemporaneously with the execution of the written contract of lease, upon which such guaranty was endorsed for "the fulfilment of the within contract," and notice to appellee of appellant's acceptance of such guaranty was wholly unnecessary.

It was further shown by the evidence that, upon the faith

of such guaranty, appellant had performed the consideration upon which the guaranty rested, by delivering the possession of the demised premises to the lessee, Delaney. "In such cases the acceptance of the guaranty, and the performance of the consideration upon which it rests, are all that are essential to make the contract complete and enforceable." So this court said (MITCHELL, J., delivering the opinion) in the recent case of *Furst & Bradley M'f'g Co.* v. *Black*, 111 Ind. 308. To the same effect, substantially, see, also, the following cases: *Taylor* v. *Taylor*, 64 Ind. 356; *Milroy* v. *Quinn*, 69 Ind. 406 (35 Am. R. 227); *Kline* v. *Raymond*, 70 Ind. 271; *Wills* v. *Ross*, 77 Ind. 1 (40 Am. R. 279); *Davis* v. *Wells*, 104 U. S. 159.

It is shown by the evidence that appellee had no notice of Delaney's default in the payment of rent until just prior to the commencement of this suit. If it be conceded that this was not such timely notice of Delaney's default as ought to have been given appellee, yet it is not shown by the evidence that any damages resulted to appellee from the failure to give him timely notice of such default. "The failure to give notice, and the resulting damages were, however, matters of defence." *Furst & Bradley M'f'g Co.* v. *Black*, *supra*. *Ward* v. *Wilson*, 100 Ind. 52 (50 Am. R. 763), and cases cited.

As the case in hand originated before a justice of the peace, it was not necessary that such matters of defence should be pleaded specially; but, under the statute, they might have been "given in evidence without plea." Section 1460, R. S. 1881.

The burden was on appellee, of course, to sustain these matters of defence by a fair preponderance of the evidence. There was no evidence given on the trial which tended, even remotely, to show that any damages did or could result to appellee from any failure to give him timely notice of Delaney's default in the payment of the rent of the demised premises.

Upon the whole case, we are of opinion that the finding

of the court below was not sustained by sufficient evidence, and that it was contrary to law, and that, for these causes, it was error to overrule appellant's motion for a new trial herein.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed Oct. 20, 1887; petition for a rehearing overruled Dec. 7, 1887.

No. 12,919.

VOGEL *v.* BROWN TOWNSHIP.

JUDGMENT. — *Township.* — *Misnomer.* — A judgment against "Brown *Civil* Township" is not void on account of the inaccuracy in the name of the political corporation.

SAME.—*Failure to Plead Misnomer.*—*Estoppel.*—Where a writ is served on a party, individual or corporate, by a wrong name, if there is a failure to appear and plead the misnomer, such party is concluded, and in all future proceedings may be connected with the judgment by proper [illegible].

SAME.—*Default.*—*Failure to Call Defendant.*—A failure to call a party before entering a default is a mere irregularity, and not a material error.

SAME.—*Summons Against Township Trustee.*—*Void Judgment Against Township.*—A summons against "Valentine Strange, trustee of Brown Civil Township," is not a writ against the township, but against its agent merely, and will not support a judgment against the township.

From the Martin Circuit Court.

T. J. Brooks, S. M. Reeve, E. Moser and *H. Q. Houghton,* for appellant.

W. R. Gardiner, S. H. Taylor and *J. T. Rogers,* for appellee.

ELLIOTT, J.—The object of this suit is to set aside a judgment obtained by the appellant in April, 1884.

One point upon which the appellee's counsel rest their case is, that the judgment is void because it is based on a complaint against Brown Civil Township. There is no substantial merit in this contention. The addition of the word "civil," while it created an inaccuracy in the name of the political corporation, did not render the judgment void. We have very many decisions defining and declaring the difference between civil and school townships, and it is by no means uncommon to speak of an ordinary township as a civil township. The word "civil" correctly describes the township, and no one could have been misled or prejudiced by its

[redacted]

The general rule is, that if the writ is served on the party by a wrong name, and he fails to appear and plead the misnomer, he is concluded, and in all future proceedings may be connected with the judgment by proper averments. *First National Bank* v. *Jaggers*, 31 Md. 38; *Smith* v. *Patten*, 6 Taunton, 115.

This rule applies to corporations as well as to natural persons. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Bloomfield R. R. Co.* v. *Burress*, 82 Ind. 83.

The failure to call the appellee before entering a default was a mere irregularity, and is not, even on appeal, considered as a material error. *Doherty* v. *Chase*, 64 Ind. 73.

The summons issued in the original action was against "Valentine Strange, trustee of Brown Civil Township, Martin county, Indiana." This can not be regarded as a writ against the township. Strange, although the trustee, was not the township. At most he was its special agent, with naked statutory powers. *Union School Tp.* v. *First Nat'l Bank*, 102 Ind. 464; *Bloomington School Tp.* v. *National, etc., Co.*, 107 Ind. 43.

Unless it is otherwise expressly declared by law, it is the people of a locality who constitute the political corporation,

and not the officers chosen by them. *City of Valparaiso* v. *Gardner*, 97 Ind. 1; Grant Corp. 357; *Lowber* v. *Mayor*, 5 Abbott Pr. Rep. 325; *Clarke* v. *City of Rochester*, 24 Barb. 446.

It is apparent, therefore, that the utmost that can be granted the appellant is, that he asked and obtained a writ against the agent, and not against the principal. This, certainly, will not support a judgment against the principal, for the general rule—and it is an elementary one—is, that the summons must issue against the principal, and not against the agent. Here there is no summons against the township, and, consequently, no legal notice, for the summons does not purport to be directed against the corporation.

The fact that knowledge of the action was possessed by the trustee will not avail, for his principal, the governmental corporation, was entitled to be notified as the law directs. It is, indeed, held by respectable authority that knowledge on the part of the defendant himself will not supply the place of a summons. *Peabody* v. *Phelps*, 9 Cal. 213; Wade Notice, section 1146.

Judgment affirmed.

Filed Nov. 17, 1887.

112	302
119	272
112	302
125	450
112	302
142	638
112	302
150	101
152	306
112	302
156	104

No. 12,954.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY COMPANY v. ADAMS.

BILL OF EXCEPTIONS.—*Clerk's Entries.—Discrepancy in Dates.—Recitals in Bill Control.*—Where there is a discrepancy in dates, concerning the order of events, between the record entries of the clerk and the recitals in a bill of exceptions, the latter will control.

SAME.—*Reserved Questions.—Exclusion of Evidence.—What Bill Must Show.—Statutes Construed.*—Construing sections 627 and 630, R. S. 1881, as *in pari materia*, it is necessary, when an appeal is taken under the latter section upon a bill of exceptions only, and the question reserved is upon the exclusion of evidence, that the bill of exceptions should contain enough of the case and the evidence touching the point in controversy as to show the relevancy of the evidence rejected.

CONTRACT.—*Action for Non-Performance.—Subsequent Performance.—Damages.*—Where an action has been commenced, upon an accrued cause, to recover damages for the non-performance of a contract, subsequent performance will not defeat it, unless the performance is with the consent of the plaintiff, or unless the latter accepts what has been done as a partial or complete discharge of the agreement.

SAME.—*Railroad.—Agreement to Fence.—Continuance of Cause to Enable Party to Perform.—Evidence.*—Where, in an action against a railroad company to recover damages for the non-performance of a contract to construct a fence along its right of way, the cause is continued until a subsequent term under a written agreement that the defendant shall by that time construct a fence of a certain quality and pay the costs of the action and the plaintiff's attorneys' fees, it is not error, upon the trial of the cause, to exclude the agreement and evidence that a fence was built, unless it is shown that there was a complete compliance with the agreement upon which the cause was continued, or that the plaintiff has accepted the fence so erected as a complete or partial compliance with the contract sued on.

From the Rush Circuit Court.

C. W. Fairbanks, J. H. Mellett, E. H. Bundy and *O. Gresham*, for appellant.

C. S. Hernly, S. H. Brown and *M. P. Turner*, for appellee.

MITCHELL, J.—Amanda Adams sued the appellant railway company to recover damages for the alleged failure of the latter to comply with a written agreement, wherein the

company agreed to build a substantial fence on both sides of its track, and construct a crossing over its right of way, in consideration of a grant of a right of way by the plaintiff over her farm.

The defendant answered by a general denial and a plea of payment. There was a finding and judgment, over a motion for a new trial, for the plaintiff below.

The only error relied on is the ruling of the court in overruling the appellant's motion for a new trial.

The bill of exceptions found in the record recites that, upon the overruling of this motion, the appellant notified the court of its intention to take the questions of law involved in the motion for a new trial and upon the pleadings to the Supreme Court upon bill of exceptions only, as provided in section 630, R. S. 1881.

No question is made here upon the pleadings. Since, therefore, the only other questions which the appellant notified the court below that it intended to take to the Supreme Court are embraced in the motion for a new trial, we confine ourselves necessarily to the consideration of those questions.

The point is made, on behalf of the appellee, that the bill of exceptions is not properly in the record. This proposition rests upon the fact that the journal entry shows that the trial was had, and the motion for a new trial overruled, on the 2d day of April, 1885, while the certificate of the judge to the bill of exceptions shows that the bill was signed on the 26th day of March, 1885. This would make it appear that the bill was signed some six or seven days before the trial occurred. It is said the bill of exceptions must, therefore, be disregarded. It must be assumed, of course, that the events recited in the bill of exceptions occurred before the bill was prepared and signed, and that an error has been committed as to the order of events either in the journal entry of the clerk or in the certificate of the judge. Where there is a discrepancy in dates, concerning the order of events,

between the journal entries of the clerk and the recitals in a bill of exceptions, the latter must control. *Carmichael* v. *Shiel*, 21 Ind. 66; *Cincinnati, etc., R. R. Co.* v. *McFarland*, 22 Ind. 459; *Alley* v. *State, ex rel.*, 76 Ind. 94.

The whole record shows that the bill of exceptions was signed and filed at the time the motion for a new trial was overruled. We must presume, therefore, that the date of the overruling of this motion, as shown upon the journal entry, was a mistake. A bill of exceptions showing the events of the trial, and the overruling of the motion for a new trial, could not have been signed before those events occurred.

The questions presented by the motion for a new trial, and which purport to be reserved by the bill of exceptions, relate to the exclusion of certain evidence offered by the appellant.

After stating that the plaintiff had offered certain evidence tending to show the cost of the construction of a fence such as the contract called for, the bill recites that the defendant below offered to prove by competent witnesses that, in October, 1884, and since the commencement of the suit, it had constructed a fence of a certain description—consisting of posts and five wires—along its right of way through the plaintiff's farm. The evidence thus offered was excluded. The bill recites that the defendant then offered in evidence the following paper or agreement, upon which the cause had been continued at a previous term, viz.:

"This cause is continued until the next term of this court, upon the express agreement that the defendant will by that time build a good and sufficient fence along its right of way over the lands of plaintiff, said fence to have enough wires thereon to turn all kinds of stock, and defendant is to pay all costs, together with plaintiff's attorneys' fee, which fee is not to exceed thirty dollars.

"INDIANA, BLOOMINGTON & WESTERN R. W. Co.

"By R. NIXON, Agent.

"HERNLY & BROWN, Att'ys for Plaintiff."

Upon objection, the court refused to admit the paper in evidence, on the ground, as stated in the bill, that it was not admissible under the pleadings, and that it was incompetent, irrelevant and immaterial. The bill states that the court thereupon found for the plaintiff, and assessed her damages at one hundred and seventy-five dollars, that being the full cost of the construction of such a fence as the agreement contemplated, without allowing any deduction for the fence constructed by the defendant since the commencement of the suit. The bill states that the ruling was made upon the ground "that said fences were constructed after the commencement of the suit, and that the construction of the fences after the commencement of the suit constituted no defence to the action, nor did the same mitigate the plaintiff's damages."

It has often been ruled that a party appealing to this court must show affirmatively by the record that the ruling or judgment appealed from is erroneous. If upon any theory reasonably consistent with what may have appeared to the court below the ruling can be sustained, this court will adopt that theory. Now, upon the facts as they appear in the case made, it must be conceded that the plaintiff below had a complete right of action against the railroad company when the action was commenced. The contract sued on required, in the absence of any time being therein specified, that the fences should be erected within a reasonable time. There had been a breach of this contract, and hence a perfected right of action to recover the amount which it would fairly cost to erect such fences as the contract called for, together with any special damage which the plaintiff may have sustained. *Louisville, etc., R. W. Co.* v. *Sumner*, 106 Ind. 55; *Logansport, etc., R. W. Co.* v. *Wray*, 52 Ind. 578; *Lawton* v. *Fitchburg R. R. Co.*, 8 Cush. 230.

Pending the action the parties agreed, assuming that the paper offered in evidence was executed by due authority, that

the railroad company should, before the ensuing term of court, complete a good fence, sufficient to turn all kinds of stock, and pay all costs, together with an attorney's fee of thirty dollars. By implication, although it is not so stipulated in terms, this was to be accepted as a satisfaction of the plaintiff's damages.

It is undoubtedly true that a defendant may, under the general issue, or any plea which puts the amount of recovery in dispute, prove partial or complete satisfaction since the suit was commenced. *Burdell* v. *Denig*, 92 U. S. 716.

Where, however, an action has been commenced for the non-performance of a contract, subsequent performance will not defeat the action, if a cause of action had accrued, unless such performance was with the express or implied consent of the plaintiff; or unless the latter has accepted what has been done as a partial or complete discharge of the agreement. *Gould* v. *Banks*, 8 Wend. 562; *Lawton* v. *Fitchburg R. R. Co.*, 8 Cush. 230.

The plaintiff agreed to continue the case and accept in satisfaction of her damages the construction of a fence of a certain quality, together with the payment of the costs and the fees of her attorneys.

The bill of exceptions recites, in an imperfect way, that the railroad company "constructed a fence of posts and five wires." There was no evidence offered or proposed which tended to prove that the fence erected was such a fence as the agreement required, or that it had been accepted as a complete or partial compliance with the contract, nor was it proposed to prove that the company had paid or tendered the costs and attorneys' fee as stipulated.

None of the evidence, either given or proposed, having reference to what had been done under the agreement, is set out in the bill of exceptions. We are, therefore, unable to apprehend the materiality of the rejected paper. It was necessary that the evidence given or proposed touching the

point in question should have been set out in the bill of exceptions. *Starry* v. *Winning*, 7 Ind. 311.

A mere recital by the court of its conclusions touching the point in controversy is not sufficient. Construing sections 627 and 630, R. S. 1881, *in pari materia*, it is necessary, when an appeal is taken under the latter section upon a bill of exceptions only, and the question reserved is upon the exclusion of evidence, that the bill of exceptions should show enough of the case, and the evidence touching the point in controversy, to show the relevancy of the evidence rejected. *Downs* v. *Opp*, 82 Ind. 166.

In the absence of anything beyond the recitals in the bill of exceptions, we must presume the evidence rejected was irrelevant.

Judgment affirmed, with costs.

Filed Nov. 19, 1887.

112	307
113	600
113	302
114	365
115	472
115	491
117	4
112	307
145	128
112	307
154	690

No. 13,023.

Trimble et al. v. McGee, Treasurer, et al.

Drainage.—*Repairs by Township Trustee.—Constitutionality of Statute.*—Section 7 of the act of March 8th, 1883, amending section 10 of the act of April 8th, 1881 (section 4282, R. S. 1881), requiring township trustees to keep public drains in repair, etc., is constitutional.

Same.—*Appeal.—Injunction.*—Where persons whose lands are assessed by the township trustee as benefited have notice of the assessments in time to appeal therefrom to the circuit court, where they can obtain all the relief which the statute contemplates, but fail to do so, they can not afterwards, in a suit for an injunction, obtain such relief.

Same.—*Complaint for Injunction.—Insufficiency of.*—For a complaint to enjoin a county treasurer from collecting assessments levied upon lands by

a township trustee to reimburse the township for money paid out for repairing and removing obstructions from public ditches, which is held insufficient to obtain equitable relief, see opinion.

From the Tipton Circuit Court.

M. Bell and *W. C. Purdum*, for appellants.

R. B. Beauchamp, G. H. Gifford and *C. W. Swaim*, for appellees.

HOWK, J.—In this case, the appellees demurred to the complaint of appellants, the plaintiffs below, upon the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained by the circuit court, and to this ruling appellants excepted, and, declining to plead further, judgment was rendered against them for appellees' costs.

From this judgment the plaintiffs below have appealed to this court, and have here assigned as error the sustaining of appellees' demurrer to their complaint.

Appellants alleged in their complaint that, on the 9th day of April, 1884, the then trustee of Wildcat township, of Tipton county, contracted with one George Russell for deepening, cleaning out and removing obstructions from ditch No. 39, partly in said township and partly in Cicero township, in such county, and, also, from ditch No. 40, in said Wildcat township, both of such ditches being public ditches theretofore constructed, or partially so, for drainage purposes, under the laws of this State; that such ditches 39 and 40 were distinct and separate drains, constructed at different times and under different proceedings, and affected different lands, and the work so contracted for by such trustee with George Russell also affected different lands; that about fifteen hundred feet in length of ditch No. 39, included in the work and repairs done by the trustee of Wildcat township, was in Cicero township; that the entire work so caused to be done by such trustee was by him contracted for and let as a whole, in one contract and as only one work, at one

dollar per rod, and was paid for out of the general fund of Wildcat township, the amount so paid, as shown by the assessment hereinafter mentioned, being $1,177.10; that, thereafter, on July 7th, 1884, the then trustee of Wildcat township made an assessment of $675.10 against plaintiffs' lands and other lands, as shown by a copy of such assessment therewith filed; that such assessment was also signed by the trustee of Madison township, and the trustee of Cicero township, and was made without personal inspection of the lands assessed; that, on August 4th, 1884, a certified copy of such assessment was filed in the office of the auditor of Tipton county. The complaint then contains similar averments in regard to the making of an assessment of $502 against certain lands in the townships of Wildcat and Madison, which assessment was also signed by the trustee of Madison township, to reimburse the general fund of Wildcat township for the amount paid for work done and repairs made on said ditch No. 40, whereof the sum of $194.50 was assessed against lands in Wildcat township, and $307.50 against lands in Madison township; and that, on August 5th, 1884, a certified copy of such assessment for ditch No. 40 was filed in the office of the auditor of Tipton county.

Appellants further averred that the county auditor had placed such ditch assessments upon the tax duplicate of Tipton county, and had delivered the same to the treasurer of such county, for collection as other taxes, at the time of the commencement of this suit; and that such treasurer was threatening to, and would, distrain and sell appellants' property for the payment of such assessments, if the same were not paid; and that the assessments so made for ditch No. 39 were apparent liens on their respective lands and clouds upon their respective titles thereto, which ought to be set aside and removed; and that such assessments were illegal and void, and ought to be set aside, for a number of reasons, which were stated at length. Wherefore, etc.

Without first setting out appellants' reasons for claiming

that the ditch assessments of which they complain were illegal and void, we will consider and decide the several questions in the case which have been presented and discussed by their counsel in their elaborate brief of this cause. It is first urged, very earnestly, by appellants' counsel, that the statute under which the township trustee caused the work to be done, and under which the assessments were made, described in the complaint, is unconstitutional and void. It is manifest that the township trustee acted throughout, in the proceedings complained of, under and pursuant to the provisions of section 7 of an act approved March 8th, 1883, entitled "An act to amend sections two (2), three (3), four (4), five (5), six (6), eight (8), and ten (10) of an act entitled 'An act concerning drainage,' approved April 8th, 1881, and declaring an emergency." Acts of 1883, pp. 173, 180. Section 7 of the amendatory act amends section 10 of the aforesaid act of April 8th, 1881, which was section 4282, R. S. 1881. In *Campbell* v. *Dwiggins*, 83 Ind. 473, and in *Tyler* v. *State, ex rel.*, 83 Ind. 563, we held that section 4282 was in part, at least, repugnant to and in conflict with section 12 of the Bill of Rights in the Constitution of this State, and section 1 of article 14 of the Federal Constitution, and was, to the extent of such repugnancy or conflict, unconstitutional and void. *Ingerman* v. *Noblesville Tp.*, 90 Ind. 393. After the cases were decided, the General Assembly amended such section 10 (section 4282, *supra*,) by section 7 of the amendatory act of March 8th, 1883, to such an extent, we think, as wholly obviated and removed the constitutional objections to the original section. The amended section requires the township trustee to give notice of his assessment, prescribes the manner in which the notices shall be given, and provides that any person aggrieved may appeal from such assessment to the circuit court of the proper county, within fifteen days after such notices have been posted.

Appellants complain that the amended statute limits the

questions to be tried and determined by the court "to the costs of such repair or removal of obstructions, and what amount thereof should be assessed on each tract of land." This limitation, however, does not affect the constitutionality of the statute. It may be that such limitation is unwise or unreasonable; but if so, the proper remedy for such an evil is an appeal to the law-making power, and not to the courts. The amended section is not repugnant to any provision of our fundamental laws, State or Federal, but is, we think, a constitutional and valid law. *State, ex rel.*, v. *Johnson*, 105 Ind. 463; *Fries* v. *Brier*, 111 Ind. 65.

This point being settled against appellants, we are of opinion that the informalities, irregularities and alleged illegalities even in the proceedings of the township trustee, of which they complain, can not be made available by them in this suit to defeat the assessments against their lands. In the absence of any showing to the contrary, it may be assumed, we think, that appellants had full notice of the assessments made by the trustee on their lands in ample time to have appealed therefrom to the circuit court of Tipton county if they were aggrieved thereby. Upon such an appeal they could have obtained all the relief which the statute contemplates they should have in such a case, namely, the determination of the costs of such repairs and work, and the assessment of the amount thereof on their respective tracts of land, in accordance with equity, fair dealing and good conscience. Appellants ask in their complaint that the county treasurer and his successors in office may be perpetually enjoined by the court from collecting such assessments. But they have wholly failed, we think, to state any equitable grounds showing, or tending to show, they were entitled to any such relief.

The statute in force at the time required the township trustee to keep the ditches in his township in proper repair and free from obstructions, so as to answer their purpose, "and pay for the same out of the general township fund; and to raise the necessary money to reimburse that fund, he shall

apportion and assess the cost thereof upon the lands which will be benefited by such repairs or removal of obstructions, according to such benefits, in his judgment."

It was nowhere alleged in the complaint that the work contracted for and let by such trustee to George Russell was not needed, so as to make the ditches 39 and 40 answer their purpose.

It was alleged that the two ditches were let in one contract, but it was not averred that they were let at too high a price, or could have been let for a less price in two or more contracts. It was alleged that Russell's contract covered 1500 feet of ditch No. 39 not within Wildcat township; but it was not shown, nor is it apparent, that appellants or their lands were or could be damaged in any way or to any extent by the fact so alleged. It was not averred in the complaint that the contract price of the work let was too high or unreasonable, or that such work had not been done in accordance with the terms of the contract; nor was it alleged that the cost of such work was not fairly and equitably apportioned and assessed against the lands benefited thereby, "according to such benefits."

We are of opinion that appellants' complaint herein shows no grounds whatever for the intervention of a court of equity or for equitable relief. *City of Logansport* v. *LaRose*, 99 Ind. 117, and authorities cited; *Center Township* v. *Board, etc.*, 110 Ind. 579.

The demurrer to the complaint was correctly sustained.

The judgment is affirmed, with costs.

Filed Nov. 19, 1887

119 318
128 490

No. 13,043.

Briggs v. Fleming et al.

Chattel Mortgage.—*Date of Execution.—Exhibit Controls Averments in Complaint.*—The date of execution stated in a chattel mortgage, which is filed as an exhibit with a complaint to foreclose it, controls the averments in the pleading.

Same.—*Recording.—Good Faith Purchasers.*—A chattel mortgage which is not recorded within ten days after its execution is not effective against purchasers in good faith of the mortgaged property.

Same.—*Presumption as to Execution and Delivery.*—The presumption is, in the absence of any showing to the contrary, that a mortgage was fully executed and delivered at its date.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

J. W. Sutton and *W. L. Radbourn*, for appellees.

Elliott, J.—The second paragraph of the answer of the appellees is bad, and, if the complaint is good, the judgment must be reversed. If, however, the complaint is bad, a bad answer is good enough for it.

The complaint seeks to foreclose a chattel mortgage, and avers that the mortgaged property was bought by the appellees. As there is no imputation of fraud, it must be presumed that they were purchasers in good faith. If they were purchasers in good faith, the mortgage can not be effective against them unless it appears that it was recorded within ten days after its execution.

It is averred in the body of the complaint that it was executed on the 30th day of July, 1884, and recorded on the 1st day of August of that year. The copy of the mortgage filed as an exhibit shows, however, that it was executed and acknowledged on the 8th day of July, 1884.

Accepting the date given in the exhibit as the true one, the mortgage was not recorded within ten days, and the complaint is clearly bad. The date stated in the exhibit must

be regarded as correct. It is well settled that the statements in the exhibit, when it is properly a part of the pleading, control the averments. *Mercer* v. *Hebert*, 41 Ind. 459; *Stafford* v. *Davidson*, 47 Ind. 319; *Crandall* v. *First Nat'l Bank*, 61 Ind. 349; *Bayless* v. *Glenn*, 72 Ind. 5, and cases cited; *Cress* v. *Hook*, 73 Ind. 177; *Watson, etc., Co.* v. *Casteel*, 73 Ind. 296.

Doubtless a mistake in the date may be shown, or it may be shown that the instrument was not delivered on the day it bears date; but there is here no attempt, directly or indirectly, to show either of these things. Where a mortgage is dated, the presumption is that it was fully executed and delivered at its date. *Foster* v. *Perkins*, 42 Maine, 168. It was incumbent on the plaintiff to remove, if he could, this presumption; and as he has not done so, it must stand against him as a *prima facie* case. *Bates* v. *Pricket*, 5 Ind. 22 (61 Am. Dec. 73); *Adams* v. *State*, 87 Ind. 573; *Louisville, etc., R. W. Co.* v. *Thompson*, 107 Ind. 442 (446).

Judgment affirmed.

Filed Nov. 19, 1887.

119 314
114 168
119 314
194 110
126 540
118 314
142 537

No. 12,948.

HARRIS ET AL. *v.* ROSS, TREASURER, ET AL.

INJUNCTION.—*Drainage Assessment.—Notice.—Complaint.*—An averment in a complaint to enjoin the sale of land under a ditch assessment, that there was "no proper or legal notice" of the proceedings to establish the drain, is a mere conclusion, and insufficient.

JUDGMENT.—*Irregularity.—Remedy.— Infancy.*—All persons, including infants, against whom a merely irregular judgment has been taken, must seek relief therefrom by direct proceedings or by an appeal.

Harris *et al.* v. Ross, Treasurer, *et al.*

INFANCY.—*Voidable Proceedings.—Personal Privilege.—Persons in Privity of Estate.*—In respect to voidable contracts and proceedings, infancy is a personal privilege, not available to persons in privity of estate.

From the Madison Circuit Court.

W. S. Diven, for appellants.

H. D. Thompson, for appellees.

MITCHELL, J.—Harris and wife commenced this action against Ross, treasurer of Madison county, to enjoin the sale of certain lands owned by the plaintiffs, which they alleged the treasurer was about to sell for the purpose of enforcing the collection of a certain ditch assessment.

It is alleged in the complaint that, at the time the assessment complained of was made, the lands affected thereby were owned by certain minor heirs, through whom the present owners and complainants claim title, they having purchased the land at a foreclosure sale.

It appears that, while the lands were owned by the minors, certain proceedings were had under the commissioners' drainage act which resulted in the establishment of a drain, and in the confirmation of certain assessments in that behalf, and that the complainants bought the land at sheriff's sale, and acquired title thereto, after the drain had been established and the assessments confirmed.

The complaint specified nine causes for an injunction, seven of which related to irregularities in the proceedings for the establishment of the ditch, while two of them charged, in substance, that the ditch had not been completed as ordered and established. The substance of the irregularities complained of is, that the minors who owned the land at the time the ditch was established were not properly and legally notified of the proceedings, and that they did not appear and answer by a guardian *ad litem*.

The court sustained a demurrer to the seven causes which set up irregularities in the proceedings, and, upon trial of the

issues made on the other causes, there was a finding and judgment for the defendants.

It is not averred that there was no notice of the proceedings for the establishment of the drain. The averment is, that there was no proper or legal notice. This is a mere conclusion of the pleader. It implies that there was notice, and, until the contrary appears, we must presume that the notice was adjudged sufficient by the board of commissioners. It is settled that the propriety or sufficiency of the notice, in a proceeding such as that in question, can not be assailed collaterally. *Deegan* v. *State, etc.*, 108 Ind. 155; *Young* v. *Sellers*, 106 Ind. 101, and cases cited. This principle applies as well where infants are concerned as where those affected are adults. All persons against whom a merely irregular judgment has been taken must seek relief therefrom by some direct proceeding, or by an appeal. Besides, it does not appear that the minors, or any one on their behalf, are now complaining, or ever have complained, of the assessment made against their land. Harris and wife, who purchased the land at sheriff's sale, with the encumbrance upon it, are the only persons complaining. Their grounds of complaint relate almost entirely to the fact that the infants had no guardian *ad litem* appointed for them, and that they were not properly notified as infants.

Nothing is shown which makes the proceedings void, and it is well settled that, as regards voidable contracts and proceedings, infancy is a personal privilege. It is available for the protection of infants, in a proper case, or for those in whose behalf they choose to assert their privilege.

The appellants can not, however, avail themselves of the privilege of those with whom they are in privity of estate for the mere purpose of setting up irregularities in the ditch proceedings. *Shrock* v. *Crowl*, 83 Ind. 243; *Price* v. *Jennings*, 62 Ind. 111.

Moreover, as has been observed, the alleged irregularities

in the ditch proceedings could not be made available to the infants themselves in this collateral way.

Concerning the finding and judgment of the court, upon the issues made on the other specifications, it is sufficient to say they are supported by competent evidence. There was, therefore, no error.

The judgment is affirmed, with costs.

Filed Nov. 17, 1887.

112	317
112	509
112	317
149	100
150	16

No. 12,918.

VOGEL v. BROWN SCHOOL TOWNSHIP.

JUDGMENT.—*Summons Against Agent.—Judgment Void Against Principal.—Township.—Trustee.*—Where the summons is issued against the trustee of a township, a judgment thereon against the township is void, it being necessary that the writ should go against the corporation.

From the Martin Circuit Court.

T. J. Brooks, S. M. Reeve, E. Moser and *H. Q. Houghton*, for appellant.

W. R. Gardiner, S. H. Taylor and *J. T. Rogers*, for appellee.

ELLIOTT, J.—This case is substantially the same as that of *Vogel* v. *Brown Tp.*, *ante*, p. 299, and is governed by the principles there declared. In this case, as in that, the summons was directed against the agent, and not against the principal, and the judgment was invalid.

The answer in this case shows that a summons was served on the trustee of the school corporation, but this does not meet the complaint, for that pleading shows that the writ did not issue against the corporation. As there was no summons

against the school township, there could be no legal notice, and without a legal notice there could be no valid judgment.

It is to be borne in mind that the question here is not as to the method of service, but as to the writ itself. Nor is the objection to the form of the writ; it goes much deeper; it is that the writ was not issued against the defendant, but against another person. It is settled that the writ must go against the corporation, and not against its agent. There is, indeed, no difference, so far as concerns the person sued, between an action against a natural person and an action against an artificial person. Field Corp., section 346.

It certainly would not be contended that a writ issued against John Doe, agent of Richard Roe, would be valid as against the latter, and what is true of such a case must be true of this.

It is unnecessary to discuss the special finding, for what we have said disposes of the whole case, including the questions arising on the finding.

Judgment affirmed.

Filed Nov. 18, 1887.

112	318
114	118
115	482
117	230
118	118
112	318
136	[illegible]
112	318
138	279
112	318
140	567
112	318
150	415

No. 12,914.

Eiler et al. v. Crull.

Fraudulent Conveyance.—*Presumption.—Trust in Favor of Creditors.*—Where one purchases and pays the consideration for real estate, and takes the conveyance in the name of another, the transaction is presumptively fraudulent as to the prior creditors of the purchaser, and, under section 2975, R. S. 1881, a trust results in their favor.

Same.—*Subjection of Property by Creditors.—Exemption from Execution.—Other Property.*—The creditors may subject such property to the payment of

their claims, unless it is exempt from execution, or unless, at the time of the conveyance, or at the time suit is brought, the debtor has a sufficient amount of other property reachable by the ordinary processes of the court to pay the debt without resorting to the property so conveyed.

SAME.—*Refusal to Apply Other Property.—Right of Creditor to Proceed Against Property Conveyed.*—If the debtor has other property, not subject to the ordinary processes of the court, which he refuses on demand to apply to the satisfaction of the debt, the creditor may proceed against the property fraudulently conveyed, and it will be no defence for the debtor to show that he had sufficient money or other property, not reachable by the ordinary processes, with which the debt could have been paid.

From the Henry Circuit Court.

S. H. Brown and *R. Warner*, for appellants.

J. H. Mellett, E. H. Bundy and *C. E. Shiveley*, for appellee.

MITCHELL, J.—This was a suit by Crull against Samuel and Jacob S. Eiler to set aside an alleged fraudulent and voluntary conveyance.

The complaint charged that the plaintiff recovered a judgment against the defendant Samuel Eiler, in December, 1882, and that an execution had been duly issued to the sheriff of the proper county, who, after having made demand for payment, and being unable to find property whereon to levy, returned the execution wholly unsatisfied.

It is charged that, in March, 1882, the execution defendant purchased a certain parcel of real estate, paying therefor one thousand dollars, and that he caused the land so purchased and paid for to be conveyed to his son, Jacob S. Eiler, who paid no part of the purchase-price, and who had no knowledge of the conveyance until after it was made.

The complaint charges that the conveyance was so made with the purpose to cheat, hinder and defraud the plaintiff and other creditors of Samuel Eiler, and that the latter at the time the conveyance was so made did not, nor did he at the time suit was commenced, have any other property subject to execution sufficient to pay all his debts.

The appellant contends that the complaint did not state

facts sufficient, and that hence the court erred in overruling his demurrer.

It is said that, so far as appears, the defendant Samuel Eiler may have had a sufficient amount of money to pay all his debts at the time he purchased and paid for the property in question, and yet have had no property subject to execution. Hence, it is argued, a debtor who employs his money which is not subject to execution in purchasing real estate, the title to which is taken in a third person, has not thereby committed a legal fraud upon his creditors, although he may have intended to do so. Sections 366, 367, 1 Story Eq. Jurisp., are relied on as sustaining this view.

The result of the doctrine declared in the above sections is, that creditors have no right to complain in case their debtor makes a voluntary conveyance of his property, unless such conveyance was legally injurious to them, by withdrawing a fund from their power which the law had not previously withdrawn. This is substantially the doctrine declared in the recent cases of *Taylor* v. *Duesterberg*, 109 Ind. 165; *Faurote* v. *Carr*, 108 Ind. 123; *Burdge* v. *Bolin*, 106 Ind. 175 (55 Am. R. 724).

In those cases the debtor had no property except such as was legally exempt from execution. The debts could not have been coercively collected, hence the transfers assailed were not legally fraudulent.

The case before us is not within the principles which ruled those cases. Nor is the common law doctrine declared by Story controlling to its full extent under our statute, which enables a creditor to reach and subject money, choses in action, and all other property belonging to his debtor, not exempt from execution, to the payment of his debt. Sections 815 to 821, R. S. 1881; *Baker* v. *State, ex rel.*, 109 Ind. 47.

The property in question having been purchased, and the consideration therefor paid, by Samuel Eiler out of money a portion of which might have been subjected to the payment of the debt, while the conveyance was taken in the name of

Jacob S., the transaction was presumptively fraudulent as to the prior creditors of Samuel, and a trust resulted in their favor under the statute, which provides, in substance, that every conveyance taken in the name of a third person shall be presumed fraudulent as against the creditors of the person paying the consideration thereof; and that, unless a fraudulent intent is disproved, a trust shall result in favor of prior creditors. Section 2975, R. S. 1881; *Hanna* v. *Aebker*, 84 Ind. 411; *Eve* v. *Louis*, 91 Ind. 457.

When a debtor purchases property and pays the consideration therefor out of money which might have been subjected to the payment of his debts, and takes the title to the property so paid for in the name of a volunteer, for the purpose of defrauding his creditors, the latter have a right to subject property so paid for, unless at the time the conveyance was taken, or when the suit was commenced, the debtor had a sufficient amount of other property subject to execution, so that the creditors might have collected their debts by the ordinary processes of the court, without resorting to the property so conveyed, or unless the debtor is entitled to hold the property exempt from execution.

If the debtor has other property, which is not subject to the ordinary processes of the court, which he has refused on demand to apply to the satisfaction of the debt, so that the creditor, in order to obtain satisfaction, is compelled to resort to an extraordinary remedy in aid of his execution, the latter may, nevertheless, proceed against property fraudulently conveyed; and it will be no defence for the debtor in such a case to show that he had sufficient money or other property, not subject to the ordinary processes of the court, with which he might, had he chosen, have paid the debt.

What has been said disposes of all the questions presented by the record.

Judgment affirmed, with costs.

Filed Nov. 18, 1887.

No. 13,704.

The Pennsylvania Company v. McCarty.

From the Clark Circuit Court.

S. Stansifer, for appellant.

J. B. Meriwether, for appellee.

Zollars, C. J.—Appellee's animal entered upon appellant's railway and was killed by one of its trains at a point in the city of Jeffersonville where the track might have been, and, under the act of 1863 (R. S. 1881, section 4025, *et seq.*,) ought to have been, but was not, securely fenced.

The decision in the recent case of *Jeffersonville, etc., R. R. Co.* v. *Dunlap*, *ante*, p. 93, is conclusive upon the question here involved. Upon the authority of that case, the judgment is affirmed, with costs.

Filed Oct. 18, 1887.

No. 10,402.

Davidson et al. v. Hutchins et al.

From the Marion Superior Court.

G. W. Galvin, for appellants.

S. Claypool and *W. A. Ketcham*, for appellees.

Howk, J.—By the record of this cause, and the errors assigned thereon by the appellants, substantially the same questions, legal and equitable, are presented for decision as those which were carefully considered and correctly decided by this court in *Davidson* v. *Koehler*, 76 Ind. 398, and in *Davidson* v. *Bates*, 111 Ind. 391. Upon the authority of the cases cited, and for the reasons given in our opinions therein, this cause must be decided as those cases were decided.

The judgment is affirmed, with costs.

Filed Sept. 29, 1887; petition for a rehearing overruled Oct. 15, 1887.

No. 12,905.

Barrett v. The State, ex rel. Marshall.

From the Delaware Circuit Court.

R. S. Gregory, *A. C. Silverburg* and *C. E. Shipley*, for appellant.

J. W. Ryan, for appellee.

Mitchell, J.—This was a proceeding by information in the nature of a *quo warranto*, instituted by the State, on the relation of Thomas Marshall, against James Barrett, to oust the latter from the office of commissioner for the third district of Delaware county.

It is conceded that the facts are parallel with those involved in the case of *Jones* v. *State, ex rel.*, *ante*, p. 193, recently decided by this court.

On the authority of that case, the rulings and judgment of the circuit court in this case are affirmed.

Judgment affirmed, with costs.

Filed Oct. 22, 1887.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1887, IN THE SEVENTY-SECOND YEAR OF THE STATE.

112	329
112	600
114	211
116	130
116	468
112	329
124	195
124	209
127	89
112	323
136	131
112	323
146	469
112	323
153	280
112	323
168	669
112	323
164	103

No. 12,814.

THE STATE, EX REL. COHEN ET AL., *v.* HAWES ET AL.

TOWNSHIP.—*Indebtedness.—Liability of Trustee and Sureties.—Act of 1883.*—To render a township trustee and his sureties liable under the act of March 5th, 1883 (Acts of 1883, p. 114), a debt must have been contracted in the name or in behalf of the township, and in violation of sections 6006 and 6007, R. S. 1881, which require an order from the county commissioners in certain cases.

SAME.—*Definition of Debt.*—It is essential to the idea of a debt that an enforceable obligation must have arisen out of a contract, express or implied, in favor of one occupying the relation of creditor, and entitling him to receive a sum of money.

SAME.—*School Supplies.*—A township trustee can not contract a debt for school supplies, unless supplies suitable and reasonably necessary for the township have been actually delivered to and received by the township.

SAME.—*Paper Issued Without Consideration Void.*—Where paper, purporting to be the obligation of a township, has been issued without any consideration, it is void, and creates no debt, and the holder, whether the payee or an assignee, has no right of action under the act of 1883.

SAME.—*Law Merchant.—Innocent Holder.*—A certificate, issued by a township trustee, reciting that there is due the payee a certain sum for

school supplies bought and received by the township, is not negotiable according to the law merchant, and, where fraudulently issued without consideration, is void, even in the hands of subsequent holders.

From the Daviess Circuit Court.

N. Morris, L. Newberger, W. R. Gardiner and *S. H. Taylor*, for appellants.

J. Baker, for appellees.

MITCHELL, C. J.—John Grimsley, as school trustee of Steele township, in Daviess county, on the 11th day of March, 1885, delivered to R. B. Pollard a certificate which recited, in effect, that there was due the latter $929 for school supplies, bought and received by the township, payable out of its school fund, at the Washington National Bank of Washington, Indiana, on the 20th day of June, 1886, with eight per cent. interest.

In a complaint against the trustee and the sureties on his official bond, the appellants, as relators, alleged that they were the holders of the certificate above referred to, having taken the same in good faith, by assignment endorsed thereon in writing. They charged that the certificate had been wrongfully and illegally issued, for the following specified reasons: Because, 1st. The pre-existing indebtedness of Steele township exceeded the amount of two per cent. of the assessed valuation of the taxable property therein; 2d. That the supplies mentioned in the certificate had never been delivered to, nor received by, the township; and, 3d. That the trustee had not obtained the order of the board of commissioners authorizing him to contract the indebtedness therein mentioned, as required by sections 6006 and 6007, R. S. 1881.

The court sustained a demurrer to the complaint, and the question presented is, whether the appellees, as sureties upon the official bond of Grimsley, are liable by reason of his having thus issued the certificate.

On behalf of the appellants, it is contended that the lia-

bility of the sureties results from the provisions of section 2 of "An act touching the duties of township trustees with reference to liquidating and contracting indebtedness of townships in certain cases," approved March 5th, 1883. Acts 1883, p. 114. This section provides "that any township trustee, in any county of the State of Indiana, who shall contract any debt in the name or in behalf of any civil or school township of which he may be the trustee, contrary to the provisions of sections 1 and 2 of 'An act to limit the powers of township trustees in incurring debts, and requiring them to designate certain days for transacting township business,' approved March 11th, 1875 (the same being numbered six thousand and six and six thousand and seven of the Revised Statutes of the State of Indiana), shall be personally liable, and liable on his official bond, to the holder of any contract or other evidence of such indebtedness, for the amount thereof."

The sections above referred to require township trustees, whenever they deem it necessary to incur any debt or debts, on behalf of their townships, in excess of the fund on hand to which such debt or debts are chargeable, and of the fund to be derived from the tax assessed against their respective townships for the year in which such debt is to be incurred, to procure an order, after due notice as therein provided, from the board of commissioners, authorizing them to contract such indebtedness.

As has been seen, the complaint charges that the order or certificate in question had been issued in violation of the statute above referred to, and that it was, moreover, wrongfully and illegally issued, in that no consideration had ever been delivered or received for the certificate.

The liability imposed by the act of 1883 requires, as a condition precedent, that the township trustee must have contracted a debt, in the name or in behalf of his township, either civil or school, and the debt must have been contracted in violation of the provisions of sections 6006 and 6007.

If, therefore, the transaction in which the certificate had its inception was such as to create no debt, or if the debt created was not within the prohibition of the above mentioned sections, manifestly the statutory liability has not been incurred by any one.

It appears from the face of the certificate that it was issued for school supplies, bought and received by the township, but the complaint avers that the supplies had never been delivered to, nor received by, the township.

We are not required, therefore, to determine whether sections 6006 and 6007 apply to the ordinary debts incurred by the trustee for furniture, apparatus and other supplies for the schools of his township, nor need we consider the relevancy of the averment that the pre-existing indebtedness of the township exceeded two per cent. of the assessed valuation of the taxable property therein. It is only necessary to say, without further remark upon this feature of the case, that, upon the facts as they appear in the complaint, no debt of any description whatever was contracted.

A debt, in its more general sense, is a specified sum of money which is due or owing from one person to another, and "denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment." Rapalje & Lawrence L. Dict., title "Debt." *Shane* v. *Francis*, 30 Ind. 92.

It is essential to the idea of a debt, that an obligation must have arisen out of a contract, express or implied, in favor of some one occupying the relation of creditor, which entitles the latter to receive a sum of money, which obligation, by possibility, might, or ought to be, enforced against another.

The mere delivery of a piece of paper which imports an obligation to pay money, but which is in fact no evidence of an actual existing debt, does not constitute the contracting of a debt.

It can not be supposed that it was the purpose of the stat-

ute to enable the holder of a contract, or other evidence of indebtedness, issued by a township trustee in the name or in behalf of his township, to hold the trustee personally liable, and liable on his official bond, whether an indebtedness had been in fact contracted or not. The recovery in any case is limited by the statute to the amount of the indebtedness, and not by the amount stipulated in the contract; hence, given a case in which there is no indebtedness—that is, no one who occupies the situation of a creditor—and there can be no recovery under the statute. *Stanton* v. *Shipley*, 27 Fed. R. 498.

A township trustee can not contract a debt for school supplies unless supplies suitable and reasonably necessary for the township have been actually delivered to, and accepted by, the township. *Bloomington School Tp.* v. *National, etc., Co.*, 107 Ind. 43; *Reeve School Tp.* v. *Dodson*, 98 Ind. 497; *Wallis* v. *Johnson School Tp.*, 75 Ind. 368.

Where, therefore, as is the case here, paper purporting to be the obligation of a township has been issued without any consideration whatever, nothing having been given or received therefor, the holder of such paper, whether he be the payee named therein or an assignee, has no right of action under the act of 1883, because the trustee has not, in any legal or equitable sense, contracted a debt. Such paper creates no obligation against any one; it is void. *Axt* v. *Jackson School Tp.*, 90 Ind. 101.

Since township trustees can issue obligations, binding on the township, only in case a debt has been contracted, and since, in any event, paper issued as evidence of an actual indebtedness already incurred by a municipal corporation, which possesses only limited powers, conferred for special and local purposes of a purely non-commercial character, is not negotiable according to the law merchant, a subsequent holder of paper issued by a township trustee can occupy no better ground than that occupied by the person to whom it was issued. *Sheffield School Tp.* v. *Andress*, 56 Ind. 157; *McCurdy* v. *Bowes*, 88 Ind. 583; *Mayor* v. *Ray*, 19

Wall. 468; *Wall* v. *County of Monroe*, 103 U. S. 74; *Police Jury* v. *Britton*, 15 Wall. 566; *First Nat'l Bank, etc.*, v. *Rush School Dist.*, 81* Pa. St. 307.

The certificate having been issued in the name and in behalf of the township without power or authority, and not as evidence of any debt contracted by the trustee, it was absolutely void in the hands of the original payee, both as respects the trustee personally and the township, and being, for that reason, void in his hands, it was equally invalid in the hands of any subsequent holder. *Bissell* v. *Spring Valley Tp.*, 110 U. S. 162; *School Dist.* v. *Stone*, 106 U. S. 183, and cases cited; *Merrill* v. *Town of Monticello*, 16 Cent. L. J. 90.

Whether, in case a township trustee actually obtains a loan in violation of sections 6006 and 6007, and misapplies or converts the money to his own use, the sureties on his bond are liable under the act of 1883, or whether the liability imposed by that act is, in any event, a mere personal liability against the trustee, are questions which do not arise in this case. See *Stanton* v. *Shipley*, *supra*.

It would seem probable that the intention of the Legislature was to afford redress to those who might become holders of contracts or other evidences of indebtedness issued by a township trustee, in the name of the township, to persons who had in good faith parted with money or property, in pursuance of a contract made by the trustee contrary to the provisions of sections 6006 and 6007, upon which the trustee was not personally bound, and which, but for those sections, would have entitled the holder to a remedy against the township. *Union School Tp.* v. *First Nat'l Bank, etc.*, 102 Ind. 464; *Pine Civil Tp.* v. *Huber Mfg. Co.*, 83 Ind. 121; *Middleton* v. *Greeson*, 106 Ind. 18.

In respect to this, as the question does not arise in the case, we decide nothing.

Judgment affirmed, with costs.

Filed Nov. 28, 1887.

119 329
118 161
193 405

No. 13,729.

Ex Parte Harrison.

County Clerk.—*Fees.—Taxation of.*—A public officer, who is required to rely upon fees for his compensation, can tax only such fees as are authorized by law, and if he is unable to collect them from the person liable the loss is his, as he accepts the office with its burdens as well as with its benefits.

Same.—*Criminal Cases.—Poor Persons.—Changes of Venue.—Allowance.—Payment Out of County Treasury.*—There is no law authorizing either the circuit court or the board of county commissioners to make an allowance to the county clerk, to be paid out of the county treasury, for services performed in criminal cases, either where the accused is admitted to defend as a poor person, or where the case is brought from another county on a change of venue.

From the Whitley Circuit Court.

T. R. Marshall and *W. F. McNagny*, for appellant.

Niblack, J.—The petition of James M. Harrison represented that he was then, and for more than five years then last past had been, the clerk of the Whitley Circuit Court; that said court had, in certain criminal cases theretofore pending therein, permitted and allowed the defendants to defend the prosecutions against them as poor persons, and had assigned counsel to such defendants, for whose services payment had been made out of the county treasury; that the said Harrison had, as such clerk, performed certain official services in said causes in issuing subpœnas, making up records and in other kindred respects, which were necessary in the disposition of said causes, and which were rendered under the order of said circuit court; that, during his, the said Harrison's, incumbency of the office of clerk, as above stated, certain criminal causes had been brought to the Whitley Circuit Court for trial on changes of venue from counties other than the county of Whitley, in which he had been compelled to perform certain official services by order of

said court; that none of said services had ever been paid for by any one, and that, in consequence, the amounts charged for such services were wholly due and unpaid. Two exhibits, containing itemized lists of the services performed, and of the amount charged for each item of service, were filed with and made a part of the petition. One of these exhibits embraced the costs charged in the cases tried on changes of venue, and the other the costs in the cases in which the defendants were allowed to defend as poor persons. The petition concluded with a prayer that the claims for costs thus presented might be audited and allowed as claims against the county, and be ordered to be paid out of the county treasury.

In support of the petition, of which the substantial parts are given as above, Joseph R. Harrison testified that he was then, and for the preceding seven years had been, deputy clerk of the Whitley Circuit Court, and, as such deputy, had, during that time, charge of the business of, as well as the books, records and papers pertaining to, that court; that the items charged for and contained in one of the exhibits accompanying the petition, and known as exhibit E, were for necessary services required to be rendered by the clerk of said court at a trial therein in the case of the State against Charles W. Butler, on an indictment for murder, and upon a change of venue from the county of Kosciusko; that the said Butler was sentenced to be hung, and was hung accordingly; that Butler left no property or estate of any kind, and, in consequence, the costs which accrued in his case remained unpaid.

The said Joseph R. Harrison further testified, that all the items of costs charged in the other exhibit, known as exhibit B, were for services performed by the clerk of the Whitley Circuit Court, by order of that court, in a considerable number of criminal cases in which the defendants were admitted to defend as poor persons, and in which counsel were assigned to the defendants and paid out of the

county treasury; that these defendants were all wholly insolvent and unable to pay any costs, and that these items of costs were, also, wholly unpaid; that all of these last named defendants, except one, were duly convicted of the offences with which they were respectively charged; that all the items of services included in both exhibits were worth the respective amounts charged for them.

The court below, after hearing this evidence, refused to allow any part of the claims thus presented as a charge upon the county treasury, but wholly rejected such claims, and every item and part of the same, to which the petitioner, Harrison, reserved an exception, and upon which he assigns error here.

The forty-fourth section of the act of March 12th, 1875, known as section 6027, R. S. 1881, provides that "In all criminal cases where the person accused shall be acquitted, no costs shall be taxed against such person, nor against the State or county, for any services rendered in such prosecutions by any prosecuting attorney, clerk, sheriff, coroner, justice of the peace, constable, or witness; but in all cases of conviction, such fees and costs shall be taxed and collected from the person convicted."

This section clearly precludes a criminal or circuit court from ordering payment for services rendered by a clerk in any criminal cause out of the county treasury where the defendant has been acquitted, and as plainly makes the defendant liable for all costs which have properly accrued in the cause, when he is convicted. R. S. 1881, section 1858.

The defendant being thus made directly liable for costs in the event of his conviction, the clerk, and the other officers named in the section, must look to him, and to him alone, for payment, unless some other provision has been either expressly or impliedly made for other means of compensation.

Sections 1413, 1414 and 1415, R. S. 1881, which have been in force since the 6th day of May, 1853, are as follows:

"1413. The auditor may draw his warrant on the treas-

urer for a sum, the amount whereof, and the time when, and the person to whom the same may be due are fixed by law, or ascertainable from a public record, with proof of personal identity."

"1414. He may also draw his warrant upon the treasurer for a sum allowed, or certified to be due, by any court of record authorized to use a seal and having jurisdiction beyond that of justices of the peace, or by the board of county commissioners."

"1415. The said courts may allow sums to persons serving as assistants to the sheriff, in preparing the court-house for the reception of such courts, and in the preservation of order, and in attendance upon juries, and to persons performing any services under the order of such court. But the number of such assistants employed shall never exceed the actual necessities of the case."

Section 1416 authorizes the courts of the class referred to in section 1414 to make allowances for fuel, furniture and repairs for their respective court-rooms; and section 1417 empowers courts of the same class to make allowances for the necessary expenses incurred in procuring the attendance of women, children, aged, infirm or poor persons as witnesses in State prosecutions. See, also, 1 R. S. 1876, 62.

With these very liberal and comprehensive provisions so long in force, it has never been held by this court that the costs which ordinarily accrue to a clerk for services performed in a criminal cause could either be taxed or allowed against the county.

The rule of decision has always in effect been, that, where a public officer is required to rely upon fees for his compensation, only such fees as are authorized by law can be taxed against any one, and that when the officer is unable to collect his fees from the person liable to pay them he must incur the loss. Laws regulating fees and salaries are presumably enacted upon the theory that each particular officer named will, under their respective provisions, be capable of realizing an

aggregate sum sufficient to compensate him for all the services he is required to perform.

Upon that theory, the officer accepts his office with all the burdens and inconveniences which are imposed by it, in conjunction with the benefits which it confers. In this view an officer, whose emoluments are derived from the allowance of fees for particular services, may be required to perform other official services without additional compensation.

The defence, by an attorney, under the order and direction of the court, of a person prosecuted for a criminal offence, constitutes a service of a different character. An attorney is neither a public officer nor an officer of the court, in the sense in which a prosecuting attorney, a clerk, a sheriff or coroner is an officer in both of these respects. In the mere practice of his profession, he is not in the receipt either of a salary or fees allowed by law, but is simply engaged in a private pursuit. Consequently, his particular services can not be required without compensation. *Blythe* v. *State*, 4 Ind. 525; *Webb* v. *Baird*, 6 Ind. 13; *Board, etc.*, v. *Wood*, 35 Ind. 70; *Gordon* v. *Board, etc.*, 52 Ind. 322; *Buchman* v. *State*, 59 Ind. 1; *Dills* v. *State*, 59 Ind. 15.

The 39th section of the act of March 31st, 1879, on the subject of fees and salaries, known as section 5766, R. S. 1881, declares that "The board of county commissioners shall, unless in cases of indispensable public necessity, to be found and entered of record as part of its orders, make no allowance not specifically required by law to any county auditor, clerk, sheriff, assessor, or treasurer, either directly or indirectly, or to any clerk, deputy, bailiff, or employee of such officer; nor shall they, except in cases above provided, employ any person to perform any duty required by law of any officer, or for any duty to be paid by commission or percentage." A violation of this provision is made a misdemeanor.

Section 40 of the same act, known as section 6030, R. S. 1881, further declares that "No judge of any court in this

State shall make any allowance to any officer or person named in this act, except as in this act provided."

There being no provision of law specifically requiring the fees charged for in this case to be paid out of the county treasury, both the board of commissioners of Whitley county and the Whitley Circuit Court are, by these last named sections, absolutely prohibited from ordering such fees to be so paid.

Sections 1778 and 1779, R. S. 1881, are in the following words:

"1778. In all changes of venue from the county, the county from which the change was taken shall be liable for the expenses and charges of removing, delivering, and keeping the prisoner, and the *per diem* allowance and expenses of the jury trying the cause, and of the whole panel of jurors in attendance during the trial."

"1779. All costs and charges specified in the last preceding section, or coming justly and equitably within its provisions, shall be audited and allowed by the court trying such cause; but where specific fees are allowed by law for any duty or service, no more or other costs shall be allowed therefor than could be legally taxed in the court from which such change was taken."

As regards the ordinary costs taxed in a criminal cause on a change of venue, the court trying the cause is, under the foregoing sections, as fully prohibited from allowing them as a charge against the county treasury as is the court from which the change was taken, and no county is any more liable for such costs than other costs in criminal cases. *Board, etc.*, v. *Summerfield*, 36 Ind. 543; *State, ex rel.*, v. *Miller*, 107 Ind. 39. Nor is there anything in section 260, R. S. 1881, authorizing a court, under certain circumstances, to allow a person to prosecute or defend an action as a poor person, which can rightfully be construed as imposing any liability on a county for costs accruing in a criminal cause. That section is a part of the civil code, and has particular refer-

ence only to civil causes. It neither changes nor assumes to change the rules governing the taxation of, or liability for, costs in criminal proceedings. *Webb* v. *Baird, supra.*

As having some bearing on the matters discussed in this cause, see the cases of *Bynum* v. *Board, etc.,* 100 Ind. 90; *Board, etc.,* v. *Gresham,* 101 Ind. 53; *Noble* v. *Board, etc.,* 101 Ind. 127; *Waymire* v. *Powell,* 105 Ind. 328.

The judgment is affirmed, with costs.

Filed Nov. 28, 1887.

No. 13,759.

The State v. Bain.

Criminal Law.—*Adultery.—Fornication.—Joint Offence.— Acquittal of One Defendant Discharges the Other.*—Adultery or fornication is the joint offence of both the participating persons, and if one shall be acquitted the other must be discharged.

Same.—*Prosecuting Attorney.—Void Agreement to Discharge Defendant.—Plea in Abatement.*—An agreement between the prosecuting attorney, with the approval of the court, and one charged with adultery or fornication, that if the latter shall give bond for his appearance from time to time, support his family and conduct himself with propriety, the cause shall be continued until a subsequent term of court, and such defendant then discharged, is unauthorized and void, and a plea in abatement by the other defendant founded thereon is bad, unless the agreement has been so far executed as to have resulted in the legal discharge or acquittal of the defendant with whom it is made.

From the Huntington Circuit Court.

L. T. Michener, Attorney General, *E. C. Vaughn,* Prosecuting Attorney, *J. H. Gillett* and *R. C. Griffith,* for the State.

B. M. Cobb and *C. W. Watkins,* for appellee.

HOWK, J.—The affidavit and information herein, filed in the court below on the 2d day of April, 1887, charged, in substance, that appellee, Sarah H. Bain, on the 1st day of January, 1887, at Huntington county, in this State, did then and there, and on divers other days and times, as well before as after that date and previous to this presentment, at and in the county and State aforesaid, she, appellee, a single woman, and Frazy E. Low, at the times aforesaid, then and there having a lawful wife living, and at all of said times she, Sarah H. Bain, and Frazy E. Low, not being married to each other, did then and there during said times, unlawfully live and cohabit together as man and wife, as Alzina Low had complained on oath, contrary to the form of the statute, etc.

Appellee answered specially, under oath, by what is called her plea in abatement herein; and to this answer or plea the State demurred, upon the ground that it did not state facts sufficient to constitute a legal bar to this prosecution, or, in any way, to abate the same. This demurrer was overruled by the court, and to this ruling the State at the time excepted; and the State refusing to reply or plead further, it was adjudged by the court that appellee go thence without day, upon her plea in abatement.

From this judgment the State appeals to this court and has here assigned as error the overruling of its demurrer to appellee's answer or plea in abatement.

In her answer or plea, appellee said that the State ought not to have or maintain this prosecution against her, because she is charged with having committed the offence of adultery and fornication with one Frazy E. Low; and she averred that, at the January term, 1887, of the court below, said Frazy E. Low was presented therein by information and affidavit charging him with adultery and fornication with appellee herein; that the acts and circumstances, and all the evidence whereby the State expected to convict appellee in this cause, were the same as, and no other than, those which

the State relied on for the conviction of said Frazy E. Low at the January term, 1887, as aforesaid; that at such January term, 1887, the State by its prosecuting attorney, with the permission of the court below, agreed that if Frazy E. Low would give a bond in the sum of fifty dollars for his appearance from time to time whenever the State should require, that he should support his wife and family, and be guilty of no acts of impropriety with appellee herein or others, and conduct himself as an industrious and orderly citizen, then such cause should be continued until the October term, 1887, of the court below, and at such term he, Low, should be discharged and wholly released from said charge.

Appellee further averred, that said Low duly filed with the clerk of such court the sum of fifty dollars in money as his bond; that since said time he, Low, had worked wherever the road for which he was employed had called on him, and had put in all the time he could; that he, Low, had not been guilty of any acts of adultery or fornication with appellee herein, nor with any one else, of appellee's knowledge, since said time; and that he, Low, had been acting in good faith with the State in such matter; that appellee herein, since said agreement was so made, had been guilty of no acts of impropriety with him, Low. Wherefore appellee said that this prosecution against her ought to abate until he, Low, should violate his agreement with the State.

Are the facts stated in appellee's answer or plea herein, the substance of which we have given, sufficient to constitute a legal bar to the State's cause of action, or to abate merely the pending prosecution? The court below held, as we understand the record now before us, that the facts stated in such answer or plea, admitted to be true by the State's demurrer as the case is now presented here, are sufficient merely to abate the pending prosecution. In other words, the court below held, as we understand its decision, that, pending the agreement between the State and Frazy E. Low, and prior to

any violation thereof by Low, the State can not prosecute appellee, Sarah H. Bain, for her participation in the same adultery or fornication which was the subject-matter of the aforesaid agreement. If such agreement was valid and binding on the State—that is, if it was such an agreement as the prosecuting attorney, with the approval of the proper court, might lawfully make in the disposition of a pending prosecution—then, it can not be doubted, as it seems to us, that the ruling of the lower court on the State's demurrer to the answer or plea herein, as we have stated such ruling, was surely not erroneous, but was clearly right. The State is, and ought to be, more interested in the reformation than in the punishment of its erring or criminal citizens, where, as here, the offence charged may be imputed to frailty and weakness, rather than to corrupt or malicious impulses or intentions.

The offence charged against appellee in the affidavit and information herein is a misdemeanor which is defined, and its punishment prescribed, in section 1991, R. S. 1881, in force since September 19th, 1881. The section reads as follows: "Whoever cohabits with another in a state of adultery or fornication shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the county jail not exceeding six months."

The offence for which appellee is prosecuted is denominated in our statute "an offence against public morals." It is an offence which can only be committed by two persons of opposite or different sexes, and it is the joint offence of both the persons participating therein—that is, both the parties cohabiting with each other must be guilty of the adultery or fornication resulting from such cohabitation, or neither of them can be guilty thereof.

Appellant's counsel concede, as, indeed, they must concede, that if Frazy E. Low had been tried and acquitted of the charge of cohabiting with appellee herein in a state of adultery or fornication, the State could not have or maintain any

prosecution against appellee for such joint offence, but she must be discharged therefrom. *Baumer* v. *State*, 49 Ind. 544, and authorities there cited.

In *Baumer* v. *State*, *supra*, Baumer was prosecuted for incest, which offence, like adultery or fornication, was necessarily the joint offence of two persons, of opposite or different sexes. Upon the point we are now considering, this court there said: "Whether they (the parties to the offence) be prosecuted in the same indictment or not, the crime must be charged as a joint crime. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one be tried and acquitted, the other must be discharged; and, it is said in the Michigan case (*Delany* v. *People*, 10 Mich. 241), that if one be tried, convicted, and sentenced, and the other tried and acquitted, this will, *ipso facto*, render the first conviction void."

Is the State bound by the aforesaid agreement, by and between the prosecuting attorney, with the approval of the court below, and said Frazy E. Low, as the same is stated in appellee's answer or plea herein? By an express provision of the statute, an indictment may "be *non-prossed* or information dismissed, * * by order of the court on motion of the prosecuting attorney." Section 1673, R. S. 1881.

There is no provision of the statute, however, which, in express terms, either authorizes or prohibits the execution of such an agreement, on behalf of the State, by and between the prosecuting attorney, with the approval of the proper court, and the defendant in a pending criminal cause, in relation to the future disposition thereof. But while this is so, we are of opinion that the alleged agreement between the prosecuting attorney and said Frazy E. Low, as stated in appellee's answer or plea herein, whether approved by the court or not, was invalid and void and was not binding on the State. It was, as we have said, wholly unauthorized by any provision of our statutes. But the effect of such agreement was to "discontinue or delay" the prosecution then

pending against Frazy E. Low for the offence defined in section 1991, above quoted; and we can say with certainty that our statutes do not countenance or tolerate, or regard favorably, any agreement having such effect. Indeed, it may be said, we think, that such an agreement is prohibited by the spirit and intention, if not by the letter, of the penal provisions of section 2013, R. S. 1881. In that section, it is made a misdemeanor, punishable by imprisonment in the county jail, or by fine, or by both, for any one to take any money or property of another, or any gratuity or reward, or any engagement or promise therefor, "upon any agreement or understanding, express or implied, to compound, discontinue, or delay any prosecution then pending for any crime or violation of statute," etc.

Manifestly, the evil to be prevented by the enactment of these statutory provisions was the compounding, the discontinuance, or the unnecessary delay of a pending prosecution for crime or for a statutory offence, while the act or thing to be punished, under such provisions, was the taking of money, property, or a gratuity or reward, or the promise thereof, upon an agreement or understanding, express or implied, to promote or accomplish such evil. We think, therefore, that the alleged agreement between the prosecuting attorney and Frazy E. Low, as stated in appellee's answer or plea, was within the prohibition of the spirit and intention of the provisions of section 2013, *supra*, as the effect of such agreement was to delay, without any apparent necessity, and ultimately to discontinue, the pending prosecution against Low, and was invalid and void. As appellee's answer or plea was founded solely upon such void agreement, it follows of necessity that such answer or plea was bad, and that the State's demurrer thereto ought to have been sustained. *Gray* v. *State*, 107 Ind. 177.

Of course, if such agreement shall be so far executed or consummated, by the action of the court below, as to have resulted in the legal discharge or acquittal of Frazy E. Low

for the joint offence of himself and appellee, before the trial of this cause in the lower court, appellee must also be discharged by the court from this prosecution. *Baumer* v. *State, supra.*

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the answer or plea in abatement, and for further proceedings not inconsistent with this opinion.

Filed Nov. 28, 1887.

No. 12,977.

JACKSON *v.* GREEN.

112 341
149 5

DEED.—*Covenant of Seisin.—Law Governing.*—Where a deed is made in this State purporting to convey land in another State, the question as to whether it contains the covenant of seisin is determined by the law of this State.

SAME.—*Short Form.—Covenants Embraced in.*—Under the statute of this State, the words "convey and warrant" comprehend and express all the covenants of warranty as fully as if they were written out at length in the deed.

SAME.—*Breach of Covenant of Seisin.*—Where a grantor has neither title nor possession, the covenant of seisin is broken as soon as the deed is executed.

SAME.—*Special Covenant.—Limitation of General.*—A special covenant "now and forever warranting and defending the said premises against all taxes against us, and against our own acts in the premises," limits the general covenants against encumbrances and for quiet enjoyment, but not the general covenant of seisin.

From the Porter Circuit Court.

E. D. Crumpacker and *P. Crumpacker*, for appellant.

W. Johnston, for appellee.

ELLIOTT, J.—The deed on which the appellant's complaint is founded purports to convey land in the State of Missouri, and is in the ordinary short form prescribed by our statute, except that it contains, in addition to the general clause "convey and warrant," the following clause: "Now and forever warranting and defending the said premises against all taxes against us, and against our own acts in the premises." This clause follows the description and is at the close of the instrument.

The breach alleged is, that the grantors never had title to any part of the land and could convey none. Neither the appellant nor the appellee has ever been in possession of the land. The deed was executed in this State.

The law of this State determines the question whether the deed contains the covenant of seisin. *Bethell* v. *Bethell*, 92 Ind. 318; *Craig* v. *Donovan*, 63 Ind. 513; *Bethell* v. *Bethell*, 54 Ind. 428.

By force of our statute, the words "convey and warrant" comprehend and express all the covenants of warranty as fully as if they were written out at full length. The deed, therefore, contains the covenant of seisin, and as the grantor had neither title nor possession, the covenant was broken as soon as the deed was executed. *Craig* v. *Donovan, supra*, and cases cited; *Bethell* v. *Bethell*, 92 Ind. 318, 321, and cases cited.

As the deed contains all the covenants, this complaint is good, unless the general covenant of seisin is limited by the special covenant of warranty. Our judgment is, that the special covenant restricts two of the general covenants and no more. The first of these is the covenant warranting against encumbrances; the operation of that covenant is limited to taxes. The second of the general covenants limited by the special covenant is that of quiet enjoyment. Rawle Cov. for Title (5th ed.), section 92.

The fair construction of the words of the special covenant, if taken apart from the other words of the deed, would be

that they extended no further than this; but, when taken, as they must be, in connection with the other parts of the deed, it becomes very clear that no other construction can be justly given them. The general covenant comprehended in the words "convey and warrant" was, certainly, intended to secure the grantee some title; but to hold that the special covenant operated to limit the covenant of seisin would effectually destroy the conveying quality of the deed. The natural presumption is that the grantor covenanted to convey the grantee some title, for this is the chief purpose of a warranty deed, and this presumption should prevail unless clearly overthrown by the special provisions of the instrument. It is but reasonable to assume that the grantor undertook to vest some title in his grantee, and this assumption ought to stand until it is made to appear that the special clauses so far break the force of the words "convey and warrant" as to make them inoperative, and this, it is obvious, would transform the deed into little else than a mere release or quitclaim. As the parties inserted in the deed general covenants of the broadest scope, the special ones should not be allowed to so restrict the force of the general ones as to make the deed practically one destitute of the great requisite of a conveyance, unless the words of the special clause are so clear and strong as to leave no other course open to the courts.

It is said, in a work of recognized authority, that "But where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent." 2 Sugden Vendors (8th Am. ed.), 283. This statement of the rule is copied with approval by Mr. Rawle. Covenants for Title (5th ed.), section 291.

The question was presented in *Rowe* v. *Heath*, 23 Texas, 614, very much as it is here, and it was held that the special covenant did not limit the general covenant of seisin.

It must be borne in mind that the covenant alleged to be broken is not an implied covenant. It is, on the contrary,

an express covenant, as fully as if written out at full length and with the utmost technicality required by the old common law rules. *Keiper* v. *Klein*, 51 Ind. 316. The authorities which hold that special express covenants control general implied ones are, therefore, not in point.

Judgment reversed.

Filed Nov. 28, 1887.

112	344
118	514
121	476
112	344
127	498
112	344
128	212
129	585
112	344
134	247
134	[illegible]
112	344
142	515
142	520
112	344
150	569

No. 12,728.

THE CITY OF INDIANAPOLIS *v.* PATTERSON.

CITY.—*Annexation of Platted Land.—Plat by One Having no Authority.*—A city has no jurisdiction to annex, by a resolution of its common council, lots laid off and platted by one who is not the owner of the land and who has no authority in the premises.

SAME.—*Husband and Wife.—Mistake.*—A husband can not, without authority from his wife, plat her land, and the fact that the land which he assumes to plat was omitted by mistake from a previous plat made and acknowledged by her can make no difference.

SAME.—*Estoppel.—Taxes.—Conveyance.—Street Improvement.*—A wife, whose land has been platted without her knowledge or consent by her husband, is not estopped to dispute the validity of the plat, and the subsequent annexation of the land to a city, by paying city taxes and executing conveyances, without knowledge of the facts, and in the belief that such transactions relate to lots previously and legally platted by her, nor by a street improvement of which she had no knowledge and which was made at the expense of lot-owners.

SAME.—*Married Woman.—Estoppel in Pais.*—Prior to September 19th, 1881, when the statutes of that year went into force, a married woman's rights in real estate could not be affected by an estoppel *in pais*.

SAME.—*Illegal Annexation.—Recovery of Taxes.—Statute of Limitations.*—Where the plat and the annexation are void, taxes assessed and collected by the city are illegal, and may, there being no estoppel, be recovered back, unless barred by the six years statute of limitations, which begins to run with each payment.

SAME.—*Removal of Married Women's Disabilities.—Statutes of 1881.*—Since the taking effect of the statutes of 1881 a married woman has been under no legal disability excepting her from the operation of the six years statute of limitations, and where the full period of the statute had run against causes of action in her favor prior to September 19th, 1881, she had two years thereafter within which to sue, and no longer.

From the Marion Superior Court.

C. S. Denny and *W. L. Taylor*, for appellant.

E. A. Parker, for appellee.

ZOLLARS, J.—Appellee brought this action to recover an amount paid by her to the city as taxes, assessed upon her land, and to enjoin the further collection of taxes theretofore assessed, and, also, to enjoin the further assessment of taxes upon the land. The facts, as shown by the pleadings and the special finding of facts, are, in substance, as follows:

On the 24th day of May, 1860, appellee was the owner in fee simple of eighteen acres of land in one body adjoining the corporate limits of the city of Indianapolis. On that day, she and her husband, Samuel J. Patterson, executed and acknowledged, in proper and legal form, a plat of eleven acres of the land as Samuel J. Patterson's addition to the city of Indianapolis, subdividing the land thus platted into small lots, streets and alleys. The plat was recorded in the proper plat-book in the office of the county recorder.

Appellee thought that the remaining seven acres of her land were included in the plat, it being her intention and desire to subdivide the whole of her land into city building lots, with the proper streets and alleys.

On the 31st day of December, 1868, Samuel J. Patterson, appellee's husband, without her knowledge or consent, executed, acknowledged and caused to be recorded a plat of the remaining seven acres of her land into lots, streets and alleys, "accurately fitting into and corresponding with" the lots, streets and alleys in the subdivision of May 24th, 1860. The lots in the two plats were so numbered that there were no duplicates, but numbered consecutively through the two ad-

ditions. The last plat, made by the husband alone, as above stated, was designated in the explanation thereon as "Patterson's extended addition" to the city of Indianapolis. In the explanation, also, it was recited that the plat was made as an extension of the plat of 1860, and reference was made to the plat-book in which that plat was recorded for a more particular description of the plat then executed by the husband.

Upon the seven acres thus platted by the husband appellee has resided with her family for many years, using the land for agricultural purposes, both before and since the platting.

On the 17th day of December, 1871, the common council of the city of Indianapolis passed a resolution in terms annexing said plats, subdivisions and lots to the city, and caused a certified copy of the resolution to be recorded by the county recorder in the proper record book. For the year 1872, and subsequent years, including the year 1882, the city assessed all of the lots in the two plats as lots in "Patterson's addition," and collected the taxes so assessed, the payments being made in April of each year succeeding the year for which the lots were assessed. The taxes were voluntarily paid, but appellee paid them, or caused them to be paid, in the belief that the lots upon which they were assessed had been included in the plat of 1860, which she acknowledged, and had been legally annexed to the city, and that they would be sold if the taxes were not paid.

On the 28th day of May, 1873, appellee and her husband executed a warranty deed to Fanny A. Patterson for five lots, and on the 18th day of October, 1877, executed a warranty deed to Elizabeth Riley for three lots. The lots were described in the deeds as in "Patterson's addition." In fact, they were in the addition as laid out by the husband in 1868. On April 4th, 1881, appellee and her husband mortgaged to the State for the use of the school fund lots 2, 3 and 4 in the addition of 1860, and lot 48 in the addition platted by

the husband in 1868. The lots were described in the mortgage as in Samuel J. Patterson's addition, and as a part of the description of the lots reference was made in the mortgage to the book and page where the plat made by the husband in 1868 was recorded.

By order of the common council in 1873, and at the expense of adjoining lot-owners, one of the north and south streets, which, according to the plats, extended through both additions, was improved through the whole of the addition platted in 1860, and through a small portion of the addition as platted by the husband in 1868.

Appellee's husband died on the 25th day of May, 1883. She commenced this action on the 16th day of May, 1884, having, on the 21st day of the preceding April, made a demand upon the city for a refunding of the taxes paid as above stated.

The common council of a city in this State has authority, without the consent of the owner, to annex territory, and extend its boundaries so as to include lots laid off and platted adjoining the city, if the plat has been acknowledged and properly recorded in the recorder's office of the county, but not otherwise. This is so well settled that it is not necessary to do more than cite the statute and some of the cases: R. S. 1881, section 3195; *Taylor* v. *City of Fort Wayne*, 47 Ind. 274; *Strosser* v. *City of Fort Wayne*, 100 Ind. 443.

It is equally clear that one person can not lay off and plat the land of another, so as to give the city jurisdiction to annex it by a resolution of its common council. The platting, laying off and acknowledging of the plat must be by the owner of the land, or by some one legally authorized so to do for the owner. A man can no more lay off and plat his wife's land, without proper authority from her, than can he the land of a stranger. He can neither sell nor encumber his wife's land by his separate act. R. S. 1881, section 5128. Nor can he, by laying it off and platting it, dedicate a por-

tion of it to streets and alleys, and thus, indirectly, subject the remainder of it to the burdens of city taxation.

As will be observed from the statement of facts above given, appellee and her husband in 1860 made a legal plat of eleven acres of her land. That plat was acknowledged by her and properly recorded. The lots in that addition were properly annexed to the city by the resolution of its common council. No question is made as to the legality of that plat, nor as to the annexation of the lots in that addition.

The controversy is as to the remaining seven acres, upon which appellee has all the while lived, and which she has used for agricultural purposes. That land has never been laid off or platted by her. In 1868 her husband laid it off and platted it as an extended addition, and caused the plat to be recorded; but he did it without any authority from her, and without her knowledge.

The court below found, as facts, that at the time appellee with her husband made and acknowledged the plat of 1860, she desired that the whole of her eighteen acres of land should be included, and thought that it was. But neither her desire in that regard, nor her mistake as to the fact, authorized her husband to lay off and plat the seven acres in 1868.

Suppose that, instead of the plat of 1860, appellee and her husband had made a deed to consummate a mere gift of her land, and that at that time she desired to give the whole of her land, and supposed that the whole of it was included in the deed, would those facts alone have authorized the husband to deed to the same person in 1868, without her authority or knowledge, the seven acres not included in the deed of 1860? Clearly not. The case supposed and the case in hand are parallel in all essentials. The donee in the deed of 1860 could not have compelled appellee to afterward make a deed for the seven acres which she supposed were included in the deed of 1860. Neither could the city compel her to lay off and plat the seven acres of land omitted from the plat of

1860, simply because she at that time desired that it should be, and thought that it had been, included in the plat of 1860. And as appellee could not be compelled to make a plat of the seven acres, so she is not estopped to dispute the validity of the plat of that land made by her husband, without her knowledge, in 1868.

After that plat was made, she joined with her husband in a mortgage upon some of the lots therein described, and also made deeds for others; but the lots were described as in Patterson's addition, and not as in Patterson's extended addition, the name given by the husband to the addition platted by him in 1868. And, moreover, at the time she executed the conveyances, she was yet ignorant of the fact that the husband had made a separate plat, and yet supposed that all of the land was included in the plat acknowledged by her in 1860. It is not shown that any of the conveyances worked any sort of injury to the city, or to any one else.

During all the years in which she paid the taxes, she supposed that the land had all been platted in 1860, and paid them under that mistake of facts.

The city improved a street through the addition platted in 1860, and for a short distance into the addition as platted by the husband in 1868, but it is not shown that appellee asked for such an improvement, or that she knew that it was being made. The evidence shows that the lots deeded away by appellee were deeded to her children, and that they asked for the improvement, which was made in front of their lots, and not in front of the land owned by appellee. Moreover, the city expended no money in the improvement of the street. The improvement was made wholly at the expense of the adjoining lot-owners.

We think that nothing is shown that ought to estop appellee from disputing the validity of the plat made by the husband in 1868, or the validity of the annexation of the seven acres of land by the city in 1871. This conclusion is

sustained by the decision and reasoning of the court in the case of *Strosser* v. *City of Fort Wayne*, *supra*.

It must be remembered, too, that, up to the 19th day of September, 1881, at least, appellee was a married woman, under the disabilities of coverture. Until the act of 1881, R. S. 1881, section 5115 *et seq.*, a married woman was not bound by an estoppel *in pais*, especially when such an estoppel was invoked to affect her right or title to real estate. *Levering* v. *Shockey*, 100 Ind. 558; *Wilhite* v. *Hamrick*, 92 Ind. 594; *Snoddy* v. *Leavitt*, 105 Ind. 357 (360), and cases there cited.

The plat of the seven acres being void, because not the act of appellee, the owner, the city had no authority to annex the land by a resolution of its common council, and the taxes assessed and collected were illegal and wrongful.

The plat and the annexation being illegal and void, and there being no estoppel, appellee's right to recover back the amount of taxes paid is settled by our cases. Beyond a citation of some of the cases, nothing further need be added: *City of Indianapolis* v. *McAvoy*, 86 Ind. 587; *Strosser* v. *City of Fort Wayne*, *supra*, and cases there cited; *City of Indianapolis* v. *Vajen*, 111 Ind. 240. See, also, *McWhinney* v. *City of Indianapolis*, 101 Ind. 150; *Newsom* v. *Board*, *etc.*, 103 Ind. 526.

Both the pleadings and the special findings of facts present the question as to whether any portion of appellee's claim is barred by the six years statute of limitations. That statute applies to cases of this sort, and applies here, and bars a portion of appellee's claim, unless saved by her coverture. *Newsom* v. *Board*, *etc.*, *supra*.

Statutes of limitation like ours run against all persons except such as are excepted from its operation. The six years statute commenced to run against appellee with each payment made. *Walker* v. *Hill*, 111 Ind. 223; *Strong* v. *Makeever*, 102 Ind. 578 (589), and cases there cited; *Wright* v. *Kleyla*, 104 Ind. 223; *Davidson* v. *Bates*, 111 Ind. 391; *Wright* v. *Wright*, 97 Ind. 444.

It is a usual thing to provide that certain persons shall be regarded as under legal disability, and that they may bring their actions within a limited time after the removal of such disability. See *Strong* v. *Makeever, supra;* R. S. 1881, sections 296, 615, 901, 2403, 6467.

But for such provisions, infants and all other persons would be equally barred by such statutes of limitation. The statute of 1881 provides, in broad and unqualified terms, as did former statutes, that certain actions, including such as this, shall be commenced within six years after the cause of action has accrued, and not afterward. R. S. 1881, section 292; 2 R. S. 1876, p. 121, section 210.

The present act provides, as did the former, that any person, being under legal disabilities when the cause of action accrues, may bring his or her action within two years after the disability is removed. R. S. 1881, section 296; 2 R. S. 1876, p. 126, section 215.

The statute of limitation under examination is now, and has been, a part of the code. The same code, as it always has done, defines the phrase "under legal disabilities," as used in the sections fixing limitations for actions. The code of 1852 provided that it should include married women, persons within the age of twenty-one years, or of unsound mind, or imprisoned, or out of the United States. 2 R. S. 1876, p. 313, section 797.

The code of 1881 provides that it shall include persons within the age of twenty-one years, or of unsound mind, or imprisoned in the State prison, or out of the United States. R. S. 1881, section 1285.

It will be observed that in the above section of the code of 1881, declaring what persons shall be included in the phrase "under legal disabilities," as used in the above statute of limitations, married women are omitted. After the taking effect of that code, therefore, on the 19th day of September, 1881, married women were no longer "under legal disabilities," in the sense of that phrase as used in the above

statute of limitations. As to that statute, the disabilities of married women were removed by section 1285, *supra*, which went into effect at the same time with the balance of the code, including that portion fixing limitations within which certain actions may be commenced. Until the code of 1881 went into effect appellee was "under legal disabilities."

That code, section 1285, removed her disabilities, so far as concerns the limitations under discussion. And so far as concerns that statute of limitations, married women in this State have been under no common law disabilities which except them from its operation since the code of 1881 went into force. Our conclusion here is sustained by former rulings. *Rosa* v. *Prather*, 103 Ind. 191; *Strong* v. *Makeever*, *supra*, p. 589.

As to the statute of limitations here under examination, section 1285 of the revision of 1881, when it took effect on the 19th day of September, 1881, removed appellee's disabilities, the same as they would have been removed by the death of her husband, had it occurred at that time. And upon that removal of her disabilities, her rights as to this particular action became the same as they would have been by the death of her husband without such a statutory provision. At the time the code of 1881 went into effect, on the 19th day of September, 1881, by which, as we have seen, appellee's disabilities were removed, the six years limitation had run against all payments of taxes prior to the 19th day of September, 1875. For the recovery of those amounts, appellee had two years after the removal of her disabilities, on the 19th day of September, 1881, in which to bring her action; in other words, she had until the 19th day of September, 1883, in which to bring her action. She did not bring it at that time, but delayed until the 16th day of May, 1884. She, therefore, can not recover the amounts paid prior to the 19th day of September, 1875. Had she commenced her action before the expiration of two years from the 19th day of September, 1881, she might have recovered the amounts paid

prior to the 19th day of September, 1875, and all amounts subsequently paid, although as to the taxes paid in April, 1876 and 1877, the six years limitations expired respectively in April, 1882 and 1883. *Wright* v. *Kleyla*, 104 Ind. 223. But, as we have seen, appellee did not commence her action within two years after her disabilities were removed by the statute, on the 19th day of September, 1881. She, therefore, lost all the benefits of section 296, giving to certain persons two years after the removal of their legal disabilities in which to begin their actions. Her case, hence, stands as though there were no such section, and she can recover only the amounts paid within six years prior to the commencement of her action, on the 16th day of May, 1884; in other words, she can not recover any amounts paid prior to the 16th day of May, 1878.

The theory of appellee and her counsel is, that her disabilities were not removed, except by the death of her husband, on the 25th day of May, 1883, and that, therefore, her action was commenced in time to save her right of recovery as to all taxes paid by her. The first paragraph of her reply to the second paragraph of appellant's answer was drawn upon that theory. The theory, however, is not tenable.

It results from our conclusion above stated, that the court below should have sustained appellant's demurrer to appellee's reply, and that the amount of recovery is too large.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to award a a new trial, sustain appellant's demurrer to the first paragraph of appellee's reply, and to proceed in accordance with this opinion.

Filed Nov. 29, 1887.

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No. 12,998.

McCann v. The First National Bank of Jeffersonville.

National Banks.—*Impairment of Capital.—Reduction of Capital Stock to Avoid Assessment.—Suspended Claims.—Subsequent Collection.—Right of Stockholder to Compel Distribution of Assets.*—Where the stockholders in a national banking association, the capital of which has become impaired by reason of past due and suspended claims, to avoid a threatened assessment by the comptroller upon the stock to make good the deficiency, lawfully reduce the capital stock in an amount equal thereto, a stockholder can not, in case the suspended claims are subsequently realized upon and carried into the account as assets, compel the bank to distribute a share of the money so realized in proportion to the amount of stock surrendered by him.

From the Clark Circuit Court.

J. G. Howard, J. F. Read, M. Z. Stannard and *A. Dowling*, for appellant.

J. K. Marsh and *Brown, Humphrey & Davis*, for appellee.

Mitchell, C. J.—The First National Bank of Jeffersonville was organized some time prior to the 17th day of August, 1876, in pursuance of the act of Congress which provides for the organization, and prescribes rules for the regulation and government, of national banking associations. The bank had, at the date mentioned, a paid up capital of $300,000, of which Michael V. McCann owned seventy-seven shares of one hundred dollars each.

Owing to the fact that there were among its assets about $71,000 of bills and notes of the Ohio Falls Car and Locomotive Company, on which the interest had remained past due and unpaid for more than six months, and which were not well secured, and in process of collection, the capital of the bank had become impaired, and the comptroller of the currency had given notice, and was about to assess the stock to the amount of $75,000 in order to make good the deficiency,

according to the requirements of U. S. Rev. Stat., section 5205. The stockholders thereupon, on due consideration, resolved to avail themselves of the privilege conferred by U. S. Rev. Stat., sections 5143 and 5204, in pursuance of which, by the required vote, they reduced the capital stock of the bank from $300,000 to $225,000. There being at that time little or no prospect that the bills and notes of the car and locomotive company would ever become collectible, they were presumably carried to the account of suspended or "bad debts," and were not thereafter included in the reports made to the comptroller as assets of the bank, although they were retained in its custody.

Some time in the year 1882 the bank realized about $75,000 from certain collaterals which had been pledged as security for the bills and notes hereinabove mentioned. This sum was carried into the account and treated as assets of the bank.

McCann, after having, with the other stockholders of the bank, surrendered an amount of his stock proportioned to the reduction made in 1876, commenced suit in May, 1885, for the purpose of compelling the bank to distribute to him a share of the $75,000 realized as above, proportioned to the amount of stock surrendered.

The question is, whether, upon the facts stated, the bank can be compelled, at the suit of a shareholder, to distribute the money realized from the collection of the suspended bills and notes.

An examination of the act of Congress makes it clear that a national banking association may, within limits, reduce its capital stock. This is provided for in express terms by section 5143, which enacts generally that shareholders owning two-thirds of the stock may reduce the capital stock of the bank to any amount not less than the minimum required by the act, nor than the amount required for the outstanding circulation of the bank, upon the approval of the comptroller. Section 5204, after providing that "No association, or any

member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital," and after prohibiting the making of dividends, in case losses have been sustained which exceed the undivided net profits then on hand, deducting from such profits its losses and bad debts, as bad debts are therein defined, concludes as follows: "But nothing in this section shall prevent the reduction of the capital stock of the association under section 5143."

Section 5205 makes provision for enforcing payment of the capital stock, in case the capital has not been paid in, and also provides for assessments upon the shareholders to make good any deficiency, in case the capital stock becomes impaired by losses or otherwise, and makes provision for forcing the association into liquidation in the event of failure to pay in the capital stock, or in case the shareholders neglect or refuse to pay up assessments which have been made in order to make good deficiencies which may have resulted from losses or otherwise.

It becomes apparent, upon looking into the act of Congress under which national banking associations are organized, and which regulates the conduct of their business, that shareholders owning the requisite amount of stock in such an association may reduce the amount of the capital, voluntarily, for the purpose, as it were, of producing a surplus for withdrawal and distribution, or they may be constrained to a reduction of the capital, rather than submit to assessments upon their stock so as to make good deficiencies occasioned by losses or otherwise. The intent and purpose of the act plainly is, that in no contingency shall the amount of the capital stock exceed its actual value, taking into account the live assets and condition of the bank. In other words, the amount of the capital must be "in line" with its value, and this uniformity may be secured either by a reduction of the amount to any point not below the minimum required, or

by assessing the stock, in case of loss or impairment, so as to make the actual value correspond uniformly with the amount of the capital stock.

The case under consideration proceeds upon the theory that the stockholders became the owners of the bills and notes the suspension of which occasioned the reduction of the capital, because they surrendered an amount of their stock sufficient to restore the equilibrium, so to speak, between the amount and value of the capital of the bank. It is assumed that if the shareholders had reduced their capital without constraint, for the purpose merely of withdrawing the excess of capital above the amount to which it was reduced, the excess would necessarily have been distributable among the shareholders. It is from this premise that the conclusion is drawn that the bank became liable to distribute the $75,000 collected in the manner hereinabove stated. In support of this conclusion *Seeley* v. *New York Nat'l Exchange Bank*, 8 Daly, 400 (Thompson Nat'l Bank Cases, 804), is cited. That was a case in which stockholders of a bank, representing two-thirds of its stock, reduced the capital of the bank, with the approval of the comptroller, from $500,000 to $300,000. The directors resolved to distribute $100,000 among the stockholders, and to retain $100,000 as a surplus fund to be used in the business of the bank. One of the stockholders, who refused to surrender any part of his stock, commenced suit, and the court held that the bank was bound to pay the whole of the $200,000, which resulted from the reduction, to the stockholders. Stress seemed to be laid upon the fact that it appeared in that case that there had been no impairment of the capital of the bank. The reduction was assimilated to the winding up of the bank *pro tanto*.

There is certainly no express provision in the law authorizing the withdrawal and distribution of any part of the capital stock of a banking association prior to the final winding up of the bank. On the contrary, as has already been

seen, section 5204, in terms, prohibits any association, or member thereof, from withdrawing, or permitting to be withdrawn, any portion of its capital stock during the time the bank continues its banking operations. Notwithstanding this prohibition, it may well be, in case a banking association should find itself unable to employ the whole of the capital originally embarked in the enterprise, and should for that reason determine upon and actually effect an authorized reduction, that the excess would in that event be liberated and cease thereafter to be part of its capital stock.

In such a case the excess could well be said to have accomplished its mission as bank capital, and, like a dividend duly declared, could not be carried to the surplus fund of the bank, and be diverted from the stockholders, without their consent. Having reduced its capital upon the sole pretext that it could not find employment for the excess, the bank would not, for obvious reasons, be heard to say, after the reduction had been allowed and made, that it would retain the money for use in its business. Such a reduction would proceed upon the implied understanding that the stockholders should have, as a consideration for the surrender of a portion of their stock, a *pro rata* distribution of the excess. To refuse to distribute the excess above what was required to maintain the reduced stock at its full value would, in such a case, be in the nature of a fraud upon the stockholders. "But it is not the rule that the reduction of the capital stock of a corporation always authorizes the distribution among the stockholders of a sum equal to the difference between the original and the reduced amount of capital. Such a distribution is lawful only when it appears that the original capital stock is unimpaired." Cook Stock and Stockholders, sections 289, 537.

In the present case the reduction was not made to effect a distribution of a portion of the accumulated surplus or unemployed capital of the bank. The original capital had become impaired by reason of "bad debts," and the stock-

holders were in the situation of being compelled to elect, either to submit to an assessment of their stock, or go into liquidation, or reduce the capital of the bank so as to put the amount of the capital in correspondence with its value. They chose the latter alternative. Rather than submit to an assessment of their stock, so as to make good the deficiency, each stockholder surrendered a proportionate share of his stock, and by that means they secured the privilege of continuing the business of the bank with a reduced capital.

The appellant, as appears from his complaint, surrendered his proportion, receiving as a consideration therefor immunity from the impending assessment, and the privilege of holding the residue of his stock in a continuing association. This was all the consideration he contemplated, and all that was implied in the transaction. *Delano* v. *Butler*, 118 U. S. 634.

Having received the whole consideration upon which the surrender was made, the stockholders could not afterwards recover more, simply because the bank succeeded in realizing upon the suspended bills and notes, the suspension of which occasioned the reduction.

If the stockholders had submitted to the proposed assessment of their stock, and paid in the $75,000 instead of reducing the capital stock, it would hardly be claimed that they would have become entitled to take or receive from the bank an equal amount of its suspended assets; nor can we perceive any reason why they should have become entitled to them because they elected to reduce the capital stock.

Corporations have no implied power to enlarge or diminish their capital, or to distribute among shareholders any part of the fund which constitutes capital stock, prior to the winding up of the corporation. *Sutherland* v. *Olcott*, 95 N. Y. 93.

Persons who invest moneyed capital in national banking associations must look to the act of Congress, to which such associations owe their existence, and which regulates their

conduct, for authority to demand the return to them of any part of the capital invested, or to receive gains in the shape of dividends therefrom. Section 5143, under which the reduction was authorized, required the bank to obtain the approval of the comptroller of the currency to the proposed reduction of its capital, and the proceedings for diminishing its capital stock ended with the approval so obtained. The capital of the bank as reduced, and the assets then held by the association, constituted a trust fund, upon the faith of which it was authorized to proceed with its business.

The directors of the bank had no authority thereafter to permit its capital stock or assets to be further depleted by distributions, in one way or the other, of bills and notes among its shareholders. *In re Exchange Banking Co.*, L. R. 21 Chan. Div. 519.

The bank held its suspended bills under the same authority, and charged with like obligations in respect thereto, as measured its rights and duties in respect to other assets. It could only distribute its surplus in money when it accumulated in the course of its business, and its right to distribute would depend upon an examination into the condition and affairs of the bank at that time. *Strong* v. *Brooklyn Cross-Town R. R. Co.*, 93 N. Y. 426.

The rights of the shareholders to compel a distribution, growing out of the reduction, were fixed by the condition of the bank as it existed when the reduction was made, and are not to be determined in the light of subsequent events.

If a distribution had been authorized and made in good faith, it is settled that the stockholders could not have been compelled to refund because of subsequent losses, even though the losses were caused by the suspension of bills and notes held by the bank at the time the distribution was made. *Main* v. *Mills*, 6 Biss. 98; *Reid* v. *Eatonton Mfg. Co.*, 40 Ga. 98.

For the same reason, the bank can not now be compelled to distribute because of subsequent events.

Upon any view of the case, the ruling of the learned judge at the circuit was right.

Judgment affirmed, with costs.

HOWK, J., did not participate in the decision of this case.

Filed Nov. 29, 1887.

No. 13,494.

ELY ET AL. v. THE BOARD OF COMMISSIONERS OF MORGAN COUNTY ET AL.

FREE GRAVEL ROAD.—*Board of Commissioners.—Jurisdiction.—Petition.*—The presentation of a petition for the establishment of a free gravel road to the board of commissioners, which is in substantial conformity with the provisions of the statute, calls into exercise the jurisdiction of the board for the determination of the sufficiency of the petition in both form and substance, whether it was signed by the requisite number of land-holders, and every other fact precedent or concurrent necessary to the granting of the petition.

SAME.—*Judgment.—Collateral Attack.*—The judgment of a board of commissioners establishing a free gravel road, after jurisdiction has been properly acquired, can not be collaterally assailed by a complaint which denies the jurisdiction of the board, on account of an alleged non-compliance with the statute, which requires the petition to be signed by a majority of the land-holders within certain territory.

From the Morgan Circuit Court.

A. W. Hendricks, O. B. Hord, A. Baker, E. Daniels and *W. S. Shirley*, for appellants.

J. H. Jordan and *O. Matthews*, for appellees.

HOWK, J.—In this case, the only error of which complaint is here made by appellants, the plaintiffs below, is the

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sustaining of the separate demurrers of the appellees to their complaint herein.

The complaint was filed in the court below on the 16th day of October, 1886. It was alleged therein by the appellants that, on the 5th day of June, 1886, Peter Slaughter and seventy-nine other persons filed a petition with the board of commissioners of Morgan county, praying for the improvement of the public highway running from the town of Brooklyn, in such county, to the city of Indianapolis, as such highway then ran, by way of the Brooklyn and Waverly gravel road to the Red House, and from such Red House, by way of Landersdale, to the boundary line between the counties of Morgan and Marion, in this State, and praying further that such public highway be graded and gravelled, and made a free gravel road, under the provisions of an act of the General Assembly of this State, approved April 8th, 1885; that, at the time of the filing of said petition with such board, a majority of the resident land-owners and land-holders of the county, whose lands were situated within two miles of said proposed improvement and were liable to be assessed therefor, had not signed such petition, and, in fact, not more than one-third of the resident land-holders whose lands were to be assessed for said improvement, as provided in section 2 of the aforesaid act, had signed said petition, the names and signatures of said Peter Slaughter and said seventy-nine other persons being the only names and signatures attached to said petition; that such board of commissioners, notwithstanding a majority of the land-holders whose lands were situated within two miles of such proposed improvement, and to be assessed therefor, had not signed the petition for said improvement, and when, in truth and in fact, not more than one-third thereof had signed the same, proceeded, without right and without having jurisdiction of such proceedings, at its June term, 1886, and appointed three disinterested freeholders of the county as viewers, and a competent surveyor to proceed upon a day named by the board to

examine, view, lay out or straighten such road and proposed improvement, and to assess the lands therefor.

And appellants further alleged, that such viewers and surveyor proceeded, as provided in said act, to view, examine and lay out said highway, as prayed for, and assess the lands within two miles thereof for the construction of the same, which assessment aggregated the sum of $9,760; that appellants at no time signed such petition; that the whole number of resident land-holders and land-owners severally owning lands within two miles of the proposed improvement, and whose lands were to be and had been assessed therefor, was two hundred and eighty; that, after the viewers and surveyor had made such assessment and filed their report thereof with the auditor of such county, notice was given by the auditor for the hearing thereof before such board of commissioners, on the 16th day of September, 1886; that, on the 17th day of September, 1886, such board entered upon its order-book an order that such improvement be made, and confirmed the assessments so made upon the lands aforesaid, in the aggregate sum of $9,760, which order remained in force and unrevoked; that, after making such order, the county board appointed appellee Pearce superintendent of the work and improvement; that appellee Pearce had given notice to let out the work for such improvement, and was letting such work with the view of making the improvement, under the order of the county board, intending to issue certificates to contractors to collect such assessments of said land-owners and appellants.

And appellants averred that, at and before the time the county board made and entered upon its order-book such order for said improvement, and confirmed such assessments so made as aforesaid, such board was notified and informed by a portion of such land-holders and owners that a majority of the resident land-holders and owners, whose lands were within two miles of the proposed improvement and had been assessed therefor, had not signed a petition praying

the county board for such improvement; but with such notice and information, in utter disregard of the rights of appellants and other land-holders, and in violation of the provisions of sections 2 and 5 of the aforesaid act, the county board made such order for said improvement and confirmed said assessments as aforesaid, and appointed such superintendent and ordered him to proceed with such work; that the taxes assessed against appellants' lands, within two miles of the proposed improvement, aggregated the sum of $1,000, and were liens and clouds upon their titles to such lands, and, in like manner, the lands of all the land-holders whose lands were within two miles of the proposed improvement, and had been assessed therefor. Wherefore, etc.

The act approved April 8th, 1885, whereof mention is made in appellants' complaint herein, the substance of which we have given, is entitled "An act concerning gravel and macadamized roads." Acts of 1885, p. 162. The act contains twenty sections, the last of which, section 20, reads as follows: "This act is not intended to repeal any law now in force for the construction of gravel and macadamized roads." At the time of the passage, approval and taking effect of the above entitled act of April 8th, 1885, the laws in force "for the construction of gravel and macadamized roads" were an act approved March 3d, 1877, entitled "An act authorizing boards of county commissioners to construct gravel, macadamized, or paved roads, upon petition of a majority of resident land-owners along and adjacent to the line of any road," etc., and acts subsequently passed amendatory thereof or supplemental thereto. Sections 5091 to 5114, R. S. 1881, and Acts of 1883, p. 121. From the law in force for the construction of gravel and macadamized roads, on and before the 8th day of April, 1885, the above entitled act then approved differs in some very material and important particulars. What the effect of this difference must be, in any case of direct and positive conflict between the provisions of the older law and those of the later act, we need not in-

quire nor attempt to determine in the cause now before us. It will suffice to say in this connection, that in *Robinson* v. *Rippey*, 111 Ind. 112, in view of the provisions of section 20, above quoted, of the later act, it was held by this court, upon full consideration, that the General Assembly did not intend, in the enactment of the above entitled act of April 8th, 1885, to repeal or supersede the older law, then in force, for the construction of gravel and macadamized roads, but did intend therein and thereby to provide another and an additional mode or system for the construction of such roads. *Board, etc.*, v. *Fullen*, 111 Ind. 410.

In the case in hand, however, it is shown by the allegations of appellants' complaint that the proceedings for the construction of the free gravel road, whereof they complain, were instituted before the board of commissioners of Morgan county on the 5th day of June, 1886, long after the above entitled act of April 8th, 1885, had taken effect and was in force, and under its provisions. There is no substantial difference between the provisions of section 1 of such act and those of section 5091, *supra*. In section 2 of the later act it is provided as follows: "Upon the presentation to the board of commissioners of any county of a petition stating the kind of improvement prayed for and the points between which the same is asked, signed by a majority of the resident land-holders of the county whose lands are within two miles of the proposed improvement, the said board of commissioners shall appoint three disinterested freeholders of the county as viewers," etc.

Appellants claim that, under these statutory provisions, and upon the averments of their complaint admitted to be true by appellees' demurrers, the board of commissioners of Morgan county did not have, and could not acquire, jurisdiction of the petition of "Peter Slaughter and seventy-nine other persons" mentioned in such complaint. Therefore, they further claim that all the proceedings and orders of such county board, had and made under said petition for the con-

struction of the free gravel road described in their complaint, were so had and made by such county board without jurisdiction of the subject-matter, and were unauthorized by law and wholly void. Their course of reasoning is this: They allege in their complaint, and appellees admit by their demurrers thereto, that the petition of Slaughter and others was not signed, as the statute requires, "by a majority of the resident land-holders of the county whose lands are within two miles of the proposed improvement;" and, therefore, appellants insist that such petition was not sufficient to give the board of commissioners of Morgan county jurisdiction of the subject-matter of such improvement. But the presentation of such petition to the county board called into exercise its jurisdiction, and required such board to determine as to the sufficiency of the petition, both in form and substance, whether or not it was signed by a majority of the resident land-holders of the county whose lands were within two miles of the proposed improvement, and every other fact, precedent or concurrent, necessary to the granting of the prayer of such petition. *Million* v. *Board, etc.*, 89 Ind. 5; *Strieb* v. *Cox*, 111 Ind. 299.

This precise question was considered by this court, with especial reference to the provisions of the above entitled act of April 8th, 1885, in *Robinson* v. *Rippey*, *supra*. The court there said: "It is contended by appellant's counsel that the board of commissioners had no jurisdiction of the subject-matter, for the reason that the petition was not signed by the requisite number of freeholders. But we think that there was such a petition as invoked the jurisdiction of the board, and that, although it may have been defective, still the proceedings are not void. The petition on its face does not reveal the absence of jurisdictional facts, and no objection was made to it before the board, so that we think the point now made is not maintainable." See, also, the cases there cited.

The right, the power, to hear and determine is jurisdiction, and this right and power were and are fully conferred upon

any board of commissioners of any county within this State in all proceedings under the aforesaid act of April 8th, 1885, for the construction of gravel and macadamized roads. This is so, even upon the question as to whether or not the petition presented to such county board was or is signed by a majority of the resident land-holders of the county whose lands were or are within two miles of the proposed improvement. The closing sentence of section 2 of such act prescribes a rule for the government of the county board in the decision of this question, as follows: "In determining said majority, minor heirs shall not be counted for or against such improvement, unless represented by a legal guardian, and the action of such guardian shall be binding upon such minors."

Now, for aught that appears to the contrary in appellants' complaint herein, fully one-half of the 280 resident land-holders of Morgan county, as alleged, whose lands were within two miles of the proposed improvement which they sought, and still are seeking, to enjoin, were at the time of the presentation of the petition for such improvement, and at the time of the hearing thereof by the county board, minor heirs who were not represented by any legal guardian. If this were so, and, as against the appellants, we may assume that such was the fact, the county board properly refused to count such minor heirs either for or against the proposed improvement, and correctly decided, for aught that appellants have shown to the contrary, that the petition for such improvement was signed by a majority of the resident land-holders of the county whose lands were within two miles of the improvement prayed for, who were competent under the statute to sign such petition, and whose names must be counted for or against such improvement "in determining said majority." It follows, therefore, that if the appellants could impeach the proceedings of the county board, whereof they complain, in this collateral suit, upon the alleged ground that the petition was not so signed by the requisite number of land-holders as to give the board jurisdiction of the subject-matter,

they have failed to state a cause of action in their complaint, in this, that they have wholly failed to show by proper averments therein that the persons who signed such petition were not a majority of the resident land-holders of Morgan county, who were competent under the statute to sign such petition, and who must be counted either for or against the improvement prayed for.

We must assume, in the absence of any averment to the contrary, that the county board found and determined that the petition of "Peter Slaughter and seventy-nine other persons" for the construction of the free gravel road described in the complaint herein was signed by a majority of the resident land-holders of the county whose lands were within two miles of the proposed improvement, and who were otherwise competent under the statute to sign such petition. It may be that the county board erred in this finding and decision, but the board had jurisdiction of the question, and was required and empowered by the statute to decide it. In such case, "the decision, whether right or wrong, can not be regarded as void, but is binding unless appealed from or avoided in some legitimate mode. * * * The power to decide at all necessarily carries with it the power to decide wrong as well as right." *Snelson* v. *State, ex rel.*, 16 Ind. 29. *Million* v. *Board, etc., supra; State, ex rel.*, v. *Board, etc.*, 101 Ind. 69; *Young* v. *Sellers*, 106 Ind. 101.

If it be conceded, therefore, that the county board erred in deciding that the petition for the construction of the free gravel road, described in the complaint herein, was signed by a majority of the land-holders of the county who were competent under the statute to sign such petition, it can not be held in this collateral suit that such erroneous decision of the board was void, or was sufficient, of itself, to render void the subsequent proceedings of the board under such petition. For any and all errors in such proceedings of the county board, the above entitled act of April 8th, 1885, affords a full, complete and adequate remedy to any person

aggrieved thereby, by providing for an appeal from such proceedings to the circuit court of the county. Appellants admit in their complaint that the statutory notice was duly given of the time fixed for the hearing of such petition, and of the report of the viewers and surveyor; and it may be fairly assumed, we think, in the absence of averment to the contrary, that they had actual notice of the pendency of such petition, and of the proceedings of the county board thereon. It is not shown by their complaint that appellants remonstrated against the proposed improvement, or resisted it in any manner, before the county board, although the statute provides for the trial by the board of issues of fact; nor is it shown that appellants, or either of them, ever appealed from the proceedings of the board to the circuit court of Morgan county.

In their complaint herein, appellants collaterally attack the validity of the proceedings and orders of the board of commissioners of Morgan county for the construction of the free gravel road described therein. Such proceedings and orders, however erroneous they may have been, were not shown by the averments of such complaint to have been void. As in other cases of collateral attack, in the absence of averment or showing to the contrary, every reasonable presumption must be indulged here, in the case now before us, in favor of the regularity, legality and validity of such proceedings and orders of the county board. This is settled by many decisions of this court. *Exchange Bank* v. *Ault*, 102 Ind. 322; *Baltimore, etc., R. R. Co.* v. *North*, 103 Ind. 486; *Indiana, etc., Co.* v. *Louisville, etc., R. W. Co.*, 107 Ind. 301; *Walker* v. *Hill*, 111 Ind. 223.

In conclusion, we are of opinion that the court below committed no error in sustaining appellees' demurrers to appellants' complaint herein.

The judgment is affirmed, with costs.

Filed Nov. 29, 1887.

No. 12,915.

Stults et al. v. Brown, Administrator.

Specific Performance.—*Decedents' Estates.—Administrator's Sale.— Contract.—Vendee's Lien.*—The vendee of a purchaser of land from an administrator, who has paid the purchase-price, but received no deed, and whose title has been invalidated by a judgment setting aside the sale by the administrator, can not maintain an action for the specific performance of the contract of sale, but may enforce a vendee's lien against the land for the amount of the purchase-price paid by him, and is entitled to an order requiring the administrator to re-sell the land to make assets for the payment of his debt, in an action brought for that purpose, and proceeding upon that theory.

From the Huntington Circuit Court.

B. M. Cobb, *B. F. Ibach* and *G. W. Stults*, for appellants.

J. C. Branyan, *M. L. Spencer* and *W. A. Branyan*, for appellee.

Elliott, J.—John Stults was appointed the administrator of the estate of Conrad Forst, deceased, on the 10th day of June, 1873. The personal property of the estate was insufficient to pay the debts, and he petitioned for an order to sell real estate. His petition was granted and the order made. On this order sale was made to Joseph Best for sixteen hundred and two dollars; this was more than the appraised value of the land. Subsequently the sale was approved and the deed confirmed. The purchase-money was paid in full and final settlement of the estate was made. After the final settlement Best sold the land to John Stults, who paid for it the sum of sixteen hundred dollars. Some time after this purchase the widow of Conrad Forst brought an action against John Stults, Joseph Best, and the heirs of Conrad Forst, deceased. On the trial of this case it was discovered that there was some irregularity in the proceedings, and the parties agreed that the sale should be set aside, and it was so adjudged. Before further proceedings were had, John Stults,

the purchaser from Joseph Best, died, leaving as his heirs these appellants. The appellee was subsequently appointed administrator *de bonis non* of the estate of Conrad Forst. The parties agree as to the facts, but differ as to the law.

We do not believe that the appellants have shown a right to a specific performance. The judgment setting aside the sale must be regarded as conclusive. That judgment establishes the invalidity of the sale, and, consequently, no title flowed from it. This effectually bars a right to enforce specific performance.

A further question remains. The father of the appellants paid sixteen hundred dollars in good faith and in expectation of securing title to the land he bargained for, and this money he ought not to lose. This result is forbidden by equity and good conscience. The estate has this money, or it has been used for its benefit. The title to the land which John Stults bargained for is still in the heirs of the decedent, and there is no necessity for resorting to proceedings to compel creditors to refund. That probably could not be done, as there is no warranty of title. The land, however, may still be made assets, if there is a deficiency of personal property. Under these circumstances, we think the appellants ought not to be sent from the courts without relief, and the only debatable question that can arise is as to the nature of the relief to be awarded. There is a clear equitable right to the money paid by their ancestor. Where there is a right there is a remedy, and there is one here. Where there is a clear equitable claim on land the claimant will not be turned away remediless. There is such a thing as a vendee's lien, and the appellants are entitled to it. This lien is the creation of courts of equity, and is a beneficent and just one. *Jones* v. *French*, 92 Ind. 138; *Seller* v. *Lingerman*, 24 Ind. 264; 1 Pomeroy Eq. Juris., section 167; 3 *Id.*, 1263; 2 Story Eq. Juris., 1231; Overton Liens, 694.

The equities of a vendee who pays money on a contract of sale are as strong as those of a vendor who does not receive

full payment for the land he sells. The principle which applies in such cases is closely analogous to the principle of subrogation. *Lowrey* v. *Byers*, 80 Ind. 443; *Stout* v. *Duncan*, 87 Ind. 383; *Dunning* v. *Seward*, 90 Ind. 63; *Short* v. *Sears*, 93 Ind. 505; *Curtis* v. *Gooding*, 99 Ind. 45.

We have no doubt that the appellants are entitled to the equitable lien of a vendee, but we are not so clear that their petition proceeds on this theory. Our conclusion is that it does not, for there is no averment that there was any denial of the lien, nor is there any allegation that the appellee refuses to make sale of the land; on the contrary, the entire frame of the petition indicates that the claim which the appellants assert is a title to the land sold under the order obtained by John Stults. On this theory the petition is not good, and it must fall. *Mescall* v. *Tully*, 91 Ind. 96, and cases cited; *Green* v. *Groves*, 109 Ind. 519, and cases cited; *First Nat'l Bank* v. *Root*, 107 Ind. 224.

The case is not that of a petition presenting a cause of action entitling the petitioner to some relief, but that of a petition claiming a relief of an entirely different character from that which the general scope of the pleading entitles the petitioner to receive. It is like the case of an absolute claim of title where there is nothing but a plain mortgage.

Upon a petition showing the same facts as those stated in the one before us, and showing, in addition, a denial of the lien and a refusal to enforce it, the appellants would make a *prima facie* case entitling them to an order directing the appellee to sell the land. That, however, is not what they do here, for here they assert a title to the land upon the sale, which had been adjudged invalid. If that sale was not valid, of course title could not be founded on it, although out of it might arise a vendee's lien. But it is not a sale to enforce that lien that is here demanded; on the contrary, the demand is that the title be put in the appellants without a second sale.

The case is not at all like *Voorhees* v. *U. S. Bank*, 10 Peters,

449, for there the validity of the sale was not questioned; that was conceded, and the only controversy was as to the authority to execute a deed to a person other than the original purchaser.

We have no doubt that a court having jurisdiction of a matter in which a judicial sale is ordered may require a deed to be executed to the person entitled to it. Rorer Judicial Sales, section 438. But that rule can not be of force where, as here, the sale upon which a deed is demanded has been conclusively adjudged invalid.

Judgment affirmed.

Filed Nov. 29, 1887.

112	373
113	239
115	509
121	271
112	373
125	41
125	420
112	373
135	414
135	576
112	373
142	423
112	373
162	182

No. 13,655.

Ford v. The State.

Criminal Law.—*Indictment.—Motion to Quash.—Motion in Arrest.—Grand Jury.—Plea.*—A motion to quash or in arrest of judgment reaches only the indictment, and raises no question as to the qualifications or empanelment of the grand jury, or as to whether the indictment was properly returned. These questions must be raised by plea.

Same.—*Grand Jury.—Record of Empanelment.—Sufficiency of.*—For record which, it is held, sufficiently shows that the grand jury was legally constituted, and the indictment properly returned, see opinion.

Same.—*Arson.—Indictment.—Uncertainty.—Surplusage.*—An indictment for arson, which describes the property alleged to have been burned as a "mill-house," is in that respect not bad for uncertainty; and the further averment that the mill-house was personal property may be treated as surplusage, and does not affect the indictment one way or the other.

Same.—*Variance.*—Where, in a prosecution for arson, the indictment averred that the property burned was a mill-house, which was personal property, and the evidence showed the building to have been real estate, and that it was a grist-mill or mill building, the variance, if any, is not fatal.

Ford v. The State.

SAME.—*Conspiracy.—Evidence.—Declarations of Co-Defendant.*—Declarations or threats made by a co-defendant, not on trial, in the absence of the defendant, long before the commission of the crime charged, and before the period at which it is claimed a conspiracy was formed looking to its commission, are not admissible in evidence.

SAME.—*Evidence.—Communication of Threats.*—In a trial for arson the admission of evidence that threats made by a defendant, not on trial, had been communicated to the owner of the property alleged to have been burned, is erroneous.

SAME.—*Witness.—Cross-Examination.—Collateral Questions.—Interest or Hostility of Witness.—Contradiction.*—Where a witness is cross-examined on a matter collateral to the issues, his answer can not be subsequently contradicted by the party putting the question; yet, where the question on cross-examination goes to the interest of the witness or his hostility to one of the parties, and he denies such interest or hostility, he may be contradicted by evidence of his own statements, or other implicative acts.

SAME.—Where, in a trial for arson, a witness on cross-examination denies having made hostile declarations concerning the owner of the property alleged to have been burned, it is competent for the cross-examining party to introduce evidence that such declarations were made.

From the Hamilton Circuit Court.

C. L. Henry, H. C. Ryan, W. R. Pierse and *C. B. Gerard*, for appellant.

J. F. Neal, Prosecuting Attorney, *M. S. Robinson* and *J. W. Lovett*, for the State.

ZOLLARS, J.—Appellant was jointly indicted in the Madison Circuit Court with John Cottrell and James T. Ford. In the first count of the indictment, the three parties are charged with the burning of a mill, the property of James and William Woodward. In the second count, Cottrell is charged with burning the mill, and the Fords are charged as accessories before the fact.

Upon a change of venue, appellant was tried and convicted in the Hamilton Circuit Court. He questioned the sufficiency of the indictment by a motion to quash, and by a motion in arrest of judgment. He assigns as errors in this court the overruling of those motions and the overruling of his motion for a new trial.

Under those assignments, he makes the points that the record does not show that the indictment was returned by the grand jury into open court, and that it does not show that the grand jury was legally constituted.

There are two sufficient answers to the points thus made. In the first place, the record sufficiently shows both facts which appellant contends it does not show; and in the second place, the questions which he seeks to make are not so presented by the record as to be available here. Following the title of the cause, which is as follows,

STATE OF INDIANA *v.* JOHN COTTRELL, GEORGE FORD, JAMES T. FORD.	No. 685.

and other entries, there is this statement in the record: "And be it further remembered that afterward, to wit, on the 20th day of October, 1886, the same being the 9th judicial day of the October term of the Madison Circuit Court, * * the following proceedings were had in said cause, to wit: Come now the grand jury in charge of their bailiff, and all being present, they find, render and return as true bills of indictment, properly signed by David W. Wood, prosecuting attorney of the 24th judicial circuit, Indiana, and endorsed by William Roach, foreman of said grand jury, bills of indictment which are marked filed this 20th day of October, 1886, Charles A. Henderson, clerk, and numbered 681 to 686 inclusive; and said grand jury also recommended that B. Seward, now in jail, charged with assault and battery with intent to kill, be discharged. And the court, being well advised in the premises, orders said B. Seward to be released and discharged from the county jail, * * * and the grand jury retire for further deliberation."

Upon the same day, and without any question as to the proper return of the indictment, appellant, as shown by the

same entry of the court's proceedings, procured a change of venue of the cause from the county.

With the presumptions that are indulged in favor of the regularity of legal proceedings, the foregoing shows, in an entirely sufficient and satisfactory manner, that the indictment was returned into open court.

The certificate of the clerk of the Madison Circuit Court shows that he forwarded to the clerk of the Hamilton Circuit Court the proper transcript of the proceedings in the cause in the Madison Circuit Court, and, also, the original indictment and papers in the cause against appellant.

The record also shows that the clerk of the Hamilton Circuit Court filed the indictment in his office on the 9th day of November, 1886, and endorsed that filing on the back of the indictment.

A copy of the indictment thus forwarded and filed, and upon which appellant was tried, is set out in the record. Upon the back of it is the number 685, and the file-mark as of Oct. 20th, 1886, in open court, by the clerk of the Madison Circuit Court, etc.

The indictment, amongst other things, contains this: "The grand jury within and for the county of Madison and State of Indiana, duly and legally empanelled, charged and sworn to inquire into all felonies," etc.

It is well settled that this court will indulge all reasonable presumptions in favor of the regularity and validity of proceedings in the lower courts, and will not reverse a judgment unless the record affirmatively shows that material errors intervened in such proceedings. Indulging that presumption, and acting upon that rule, it must be held that it sufficiently appears from the record here that the indictment was found and returned by a legal and duly qualified grand jury.

The following, amongst other cases that might be cited, fully sustain our conclusions here, and thus far stated: *Holloway* v. *State*, 53 Ind. 554; *Bailey* v. *State*, 39 Ind. 438; *Willey* v. *State*, 46 Ind. 363; *Long* v. *State*, 46 Ind. 582;

Powers v. *State*, 87 Ind. 144; *Stout* v. *State*, 93 Ind. 150; *Henning* v. *State*, 106 Ind. 386; *Epps* v. *State*, 102 Ind. 539; *Cline* v. *Lindsey*, 110 Ind. 337.

In some of our cases, especially in some of the earlier cases, it was held that a motion to quash an indictment, or a motion in arrest of judgment, should be sustained where the record does not show the return of the indictment into open court by a competent grand jury, duly empanelled. But in the later, and, we think, the better considered cases, it has been held that a motion to quash or a motion in arrest of judgment reaches the indictment, and nothing more, and that if the defendant seeks to make any question as to the qualification of the grand jury, or any member of the panel, or any question as to whether the grand jury was properly empanelled, or as to whether the indictment was properly returned into open court, he must do so by a proper plea, and that he can not reach those questions by a motion to quash the indictment or in arrest of judgment. *Padgett* v. *State*, 103 Ind. 550; *Mathis* v. *State*, 94 Ind. 562; *Wills* v. *State*, 69 Ind. 286. See, also, *Willey* v. *State*, *supra*; *Bell* v. *State*, 42 Ind. 335, and cases there cited.

Our statute provides that no indictment shall be deemed invalid, or quashed, for certain defects, amongst which is, for an omission to allege that the grand jury were empanelled, sworn or charged. R. S. 1881, section 1756.

In section 1759, the causes for which an indictment may be quashed are stated, but none of them refer to the empanelling or qualification of the grand jury, or the returning of the indictment into court.

The statute creating and defining the crime of arson provides that "Whoever wilfully and maliciously burns or attempts to burn any dwelling-house or other building, finished or unfinished, occupied or unoccupied, whether the building be used or intended for a dwelling-house or for any other purpose, * * * being the property of another, * * * is guilty of arson," etc.

The indictment charges the burning of a "certain mill-house, being then and there of the value of ten thousand dollars, and being then and there the personal property of other persons, to wit, the property of James R. Woodward and William Woodward."

It is contended by appellant, that the description of the property burned as a "mill-house" is not sufficiently certain, and that the indictment should have been quashed for uncertainty.

While the indictment is not so certain in the description of the property burned as it might have been made, we do not think that the uncertainty is such as would justify the court in quashing it.

In passing upon indictments, the courts of this State are to keep in view our statutes which are intended to dispense with many of the technical rules of the common law in criminal procedure.

Section 1755 provides, amongst other things, that an indictment is sufficient if the offence is clearly set forth in plain and concise language, and with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case.

Section 1756 provides that an indictment shall not be quashed for certain defects specified, amongst which is, "For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

"Mill-house" is not the most happy description of a building enclosing mill machinery, or used for milling purposes, but any one understands from that description that such a building is meant. The word "house" clearly means a building, in the ordinary use of the word, and such building or house is not necessarily the habitation of man or beast. There are slaughter-houses, packing-houses, smoke-houses, etc., indicating houses in which animals are slaughtered, meats packed and smoked, etc. So, a "mill-house," we

think, would readily be understood to be a building or house used for milling purposes. See *Dugle* v. *State*, 100 Ind. 259.

A "mill-house" may, or it may not, be personal property. The statement in the indictment that the "mill-house" is the personal property of Woodward is a conclusion of law, rather than the statement of a fact, and, for that reason, may be regarded as surplusage, not affecting the indictment one way or the other. Section 1756, *supra*; *State* v. *McDonald*, 106 Ind. 233. And even though the property, the mill-house, may have been shown by the evidence, as contended by appellant, to be real estate, that did not constitute a fatal variance. Nor is it a fatal variance that the evidence shows that the property burned was a grist-mill or mill building. The building was a mill-house, as well as a grist-mill or mill building.

Longacker, one of the State's witnesses, having testified that in the fall of 1884 he had conversations with James T. Ford, one of the parties jointly indicted with appellant, was allowed to give the same over appellant's objection. The witness stated, in substance, that on one occasion, when he and James T. were standing in front of the mill of James Ford, father of James T. and uncle of appellant, and in a conversation about the Woodward mill having all the custom, James T. said that that mill would not always be in the way. And in another conversation about the same time, in the engine-house of his father's mill, where the witness was at work as engineer, James T. asked him what effect the burning of the mill would have on the engine and machinery.

Hart, another of the State's witnesses, having also testified that he had a conversation with James T. Ford near a year prior to the burning of the Woodward mill, was allowed to give it, over appellant's objection. The witness stated, in substance, that he was working at the Ford mill; that on one occasion James T., after a negotiation for a load of wheat, went into the mill where the witness was, and, with an oath,

declared that he would stop the Woodwards buying wheat, and that their mill would be in ashes inside of a year.

It will be observed that the conversations detailed by Longacker occurred near two years prior to the burning of the Woodward mill, and that detailed by Hart about one year prior to that burning.

It will be observed, also, that the statements by James T., as detailed by the witnesses, consist of individual inquiries and threats. Neither appellant nor Cottrell, jointly indicted with him and James T., was present at the conversations between the witnesses and James T. It is not claimed that Cottrell at any time had any conversation or communication of any sort with James T. in relation to the burning of the Woodward mill. Nor is it claimed that he ever heard of the conversations and threats detailed by the witnesses, or that he had any knowledge of any purpose or desire on the part of James T., as connected with the Woodward mill, if he had any, except as he claims to have heard from appellant a few days before the burning of the mill in August, 1886. His first acquaintance with appellant was in the winter or spring preceding the burning of the mill.

Appellant returned to the neighborhood to live about April, 1886. It is conceded, or at least not questioned, that for several years prior to that time he had been away, following his occupation as railroad engineer.

It is claimed on the one hand by the State, that Cottrell's testimony is corroborated, and on the other hand by appellant, that it is not only not corroborated, but at many points weakened and destroyed. For the present purpose it is sufficient to say that, whether corroborated or not, Cottrell is the one witness upon whose testimony appellant's conviction rests. Cottrell alone burned the mill. On the night it was burned James T. Ford was at home with his family, and appellant was in Indianapolis.

Cottrell's statement is, that appellant induced and hired him to burn the mill, saying, in some of the first interviews,

that if he would do so, he, appellant, would procure for him fifty dollars from James T. Ford; that, shortly afterwards, appellant informed him that he could not get so much as fifty dollars, and gave him a small sum, and promised to take him to Texas and procure for him a position on a railroad.

The conversations detailed by Cottrell as having taken place between him and appellant were had but a few days prior to the burning of the mill. According to his statements, he had no thought of burning the mill prior to the propositions thus made by appellant. If then, prior to that time, there was any scheme to burn the mill, Cottrell, according to his statement, was not connected with it.

As we have said, there is no claim that appellant was present when the statements and threats, as detailed by Longacker and Hart, were made by James T. Ford.

There is no evidence of any concert of action on the part of appellant and James T. Ford, nor of any agreement or conspiracy between them to burn the mill, or to procure it to be burned, at the time, or at all near the time, when the statements and threats were made by James T. Ford, as detailed by Longacker and Hart.

As we understand the argument of counsel for the State, it is not claimed that the evidence in any way connects appellant with any scheme to burn the mill at the time those statements were made by James T. Ford, or in any way shows that, at that time, he had any knowledge of any such scheme, if any existed.

It may be conceded, that, by the testimony of Cottrell, it is shown, *prima facie*, as against appellant, that some time prior to the burning of the mill, but months, and in one instance more than a year, subsequent to the statements by James T., as detailed by the witnesses, appellant and James T. confederated together to burn or to procure the burning of the mill. With that concession, the question is, are those declarations by James T., in the absence of appellant, competent evidence against him upon his separate trial?

It is settled, that when a conspiracy is once established, and until the consummation of the object in view, if the conspiracy last that long, every act and declaration of one conspirator in pursuance of the original concerted plan, and in reference to and in furtherance of the common object, even in the absence of the others, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each. All are deemed to assent to or commend what is said or done by any one in furtherance of the common object.

It has been said, and correctly, too, that the principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestæ*, and, therefore, the act of all; that it is the same principle of identity with each other that governs in regard to the acts and admissions of agents, when offered in evidence against their principals, and of partners, as against the partnership. *Nevill* v. *State*, 60 Ind. 308; *Hogue* v. *McClintock*, 76 Ind. 205; *Wiley* v. *State*, 52 Ind. 475; *Smith* v. *Freeman*, 71 Ind. 85; *Caldwell* v. *Williams*, 1 Ind. 405; Wharton Crim. Ev., section 698; 1 Bishop Crim. Proc., section 1248; Roscoe Crim. Ev. 414; Abbott Trial Ev. 190; 3 Greenl. Ev., section 94; 1 Greenl. Ev., section 111; *State* v. *Larkin*, 49 N. H. 39.

The evidence of the declarations of James T. Ford does not come within the rule as above stated, nor within the spirit of it, and we think should not have been admitted. In the first place, the gravamen of the offence charged is not a conspiracy. See *Strout* v. *Packard*, 76 Maine, 148; *State* v. *Larkin*, *supra*. In the next place, some of the declarations were made months, and some of them more than a year, before it is

claimed that appellant had anything to do with any scheme to burn the mill.

At the time they were made there was no conspiracy, unless it be said that James T. conspired with himself. And, further, the declarations were but mere threats. They were not so connected with the burning of the mill in time and character as properly to be said to be a part of the *res gestæ*.

Without committing this court to all that is said in those cases, we cite in this connection *Fouts* v. *State*, 7 Ohio St. 471; *Wilson* v. *People*, 94 Ill. 299; *Cox* v. *State*, 8 Tex. App. 254 (303); Bump Fraudulent Conveyances, 583.

If it be said that such evidence is competent for the purpose of proving a conspiracy, it may be answered that whatever weight it might have in that regard here, it would also have in connecting appellant with that conspiracy, because there is no claim that there was any conspiracy except as between him and James T. Ford. It is settled everywhere, that one person can not be connected with a conspiracy by the declarations of another, and that declarations are incompetent for that purpose. *Wolfe* v. *Pugh*, 101 Ind. 293 (306); Abbott Trial Ev. 191; *United States* v. *McKee*, 3 Cent. L. J. 95; *United States* v. *Babcock*, 3 Cent. L. J. 143; 2 Whart. Ev., sections 1183, 1206.

James Woodward, one of the owners of the property burned, was called as a witness for the State, and, over appellant's objection, was allowed to state that in the spring of 1886, and prior thereto, Emanuel Hart notified him of threats made by James T. Ford.

We know of no principle of the law that will sanction the admission of that evidence. It was clearly erroneous.

James Ford, an uncle of appellant, and father of James T. Ford, jointly indicted with appellant, was a witness for appellant. On cross-examination counsel for the State asked him, in substance, if he had not, in a conversation with Peter Miller at his mill, two years prior to the trial, in speaking of the competition between his mill and the Woodward mill,

said that the Woodward mill would not do much harm; that in two years it would sell for old iron. And, further, if he did not, in a conversation at his mill shortly after it was started in business, and in the presence of Walter Gross, say that the Woodward boys would be glad to sell their mill for old iron inside of two years.

Over appellant's objections and exceptions, the questions were allowed, and the witness directed to answer. He answered each in the negative. The State called Miller and Gross, and, over appellant's objection, they were allowed to, and did, testify that the witness, James Ford, made the statements which the questions to him indicate, and which he denied having made.

The general rule, as approved by this court and the authorities elsewhere, is, that when a witness is cross-examined on a matter collateral to the issues, his answer can not be subsequently contradicted by the party putting the question.

The test of whether a fact inquired of on cross-examination is collateral, it has been said, is this: Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? Wharton Crim. Ev., section 484; *Welch* v. *State*, 104 Ind. 347. See, also, *City of South Bend* v. *Hardy*, 98 Ind. 577.

The rule and test above stated, however, have not been so applied as to exclude a cross-examination as to the interest of the witness in the case, or his hostility to one of the parties. If, on such cross-examination, the witness denies such interest or hostility, he may be contradicted by evidence of his own statements, or other implicative acts. Wharton Crim. Ev., section 484; *Scott* v. *State*, 64 Ind. 400; *Johnson* v. *Wiley*, 74 Ind. 233. See, also, *Stone* v. *State, ex rel.*, 97 Ind. 345; Roscoe Crim. Ev. 102; *Starks* v. *People*, 5 Denio, 106; *Newton* v. *Harris*, 6 N. Y. 345.

In the case before us, the Woodwards are not parties to the prosecution, but we think that, as the owners of the property burned, they have such a relation to the prosecu-

tion as to bring the case within the spirit of the rule and render the cross-examination of the witness James Ford and the testimony of Miller and Gross competent. That testimony tends to show that the witness James Ford was hostile to the Woodwards, and thus, within the spirit of the rule, tends to show that he is not an impartial witness. How much weight should be attached to that testimony is another question, and one for the jury. We are dealing with its competency simply, and not with its weight.

It is claimed by counsel for the State, that whatever errors may have intervened are harmless ones, and that, therefore, the judgment should be affirmed. An examination of the questions, and of the record, has led us to a different conclusion.

Questions other than those here decided are discussed by counsel. We have decided those which, in our judgment, may arise again upon a re-trial of the cause.

The judgment is reversed, and the cause remanded, with instructions to the court below to grant a new trial. The clerk will make the proper order for the return of appellant to the custody of the sheriff of Hamilton county.

Filed Nov. 29, 1887.

No. 12,467.

GREGORY, ADMINISTRATOR, *v.* THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILROAD COMPANY.

NEGLIGENCE.—*Wilful Injury.—Complaint.*—A complaint to recover damages for an injury should proceed upon a definite theory, either for a wilful injury or for one caused by negligence, and it will be judged from its general scope and tenor.

112	385
112	423
113	585
115	120
115	254
117	254
117	593
119	317
[illegible]	429
112	385
146	433
112	385
153	165
112	385
156	588
112	385
158	240
158	277
158	278
158	279
112	385
164	425
164	605
112	385
165	358
112	385
169	642

Gregory, Administrator, v. The C., C., C. and I. Railroad Company.

SAME.—*Sufficiency of Complaint for Wilful Injury.*—A complaint to recover damages for a wilful injury must show that the injurious act was purposely or intentionally committed, with the intent wilfully and purposely to inflict the injury complained of.

SAME.—*Intent.—Evidence.*—The unlawful intent may be shown by direct evidence, or it may be inferred from conduct which shows a reckless disregard of consequences and a willingness to inflict injury, by purposely and voluntarily doing an act with knowledge that some one is unconsciously or unavoidably in a situation to be injured thereby.

SAME.—*Verdict.—When Court May Direct.*—If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, the court may direct a verdict for the defendant without submitting the evidence to the jury.

From the Marion Superior Court.

J. W. Gordon, L. O. Bailey, R. N. Lamb and *A. L. Mason*, for appellant.

A. C. Harris, W. H. Calkins and *H. H. Poppleton*, for appellee.

MITCHELL, C. J.—Joseph W. Gregory, as administrator of the estate of Ida M. Sennett, deceased, brought this action against the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company to recover damages for wrongfully causing the death of his intestate.

The first paragraph of the complaint charges, in substance, that the railway company, on the 13th day of February, 1882, within the city of Indianapolis, "did so manage, control and operate her said trains, recklessly, with gross negligence, without regard to consequences, and with fatal and inexcusable heedlessness, as to run one of her said trains upon plaintiff's decedent with great force," whereby the said decedent was killed without any fault on her part.

The second paragraph charges that the railway company, on the date mentioned, operated its trains "with such gross negligence, recklessness and inexcusable disregard of consequences, and wilful misconduct, as to negligently, wantonly and wilfully cause or allow the tender attached to one of its

trains to strike the person of said decedent with great force and fatal violence," thereby causing her death.

The second paragraph contained no averment that the decedent was without fault.

In neither of the foregoing paragraphs is it charged that the decedent was either purposely, intentionally or wilfully run upon and killed or injured by the railway company, or its servants, nor does either of them state facts from which such an inference can be drawn.

It is only necessary to charge, in a complaint which seeks redress for a wilful injury, that the injurious act was purposely and intentionally committed, with the intent wilfully and purposely to inflict the injury complained of.

As a rule of evidence, the presumption that every person intends the natural and probable consequences of his wrongful or unlawful acts applies as well in civil as in criminal cases; hence, the unlawful intent may be shown by direct evidence, or it may be inferred from conduct which shows a reckless disregard of consequences, and a willingness to inflict injury, by purposely and voluntarily doing an act, with knowledge that some one is unconsciously or unavoidably in a situation to be injured thereby. An act which in itself might be lawful becomes unlawful when done in a manner or under circumstances which charge the actor with knowledge that it will result in injury to some one. *Palmer* v. *Chicago, etc., R. R. Co., ante*, p. 250; *Louisville, etc., R. W. Co.* v. *Ader*, 110 Ind. 376; *Louisville, etc., R. W. Co.* v. *Bryan*, 107 Ind. 51; *Belt R. R. Co.* v. *Mann*, 107 Ind. 89; *Pennsylvania Co.* v. *Smith*, 98 Ind. 42.

As was in effect said in *Louisville, etc., R. W. Co.* v. *Bryan, supra*, there is a clear distinction between cases which count upon negligence as a ground of action and those which are founded upon acts of aggressive wrong or wilfulness, and a pleading should not be tolerated which proceeds upon the idea that it may be good either for a wilful injury or as a complaint for an injury occasioned by negligence. It should

proceed upon one theory or the other, and is to be judged from its general tenor and scope. *Louisville, etc., R. W. Co.* v. *Schmidt*, 106 Ind. 73; *Mescall* v. *Tully*, 91 Ind. 96; *Platter* v. *City of Seymour*, 86 Ind. 323.

That the complaint under consideration abounds in vituperative epithets, and that some detached phrases, alleging wilful misconduct, are thrown in, does not supply the necessary averment that the injury was purposely or intentionally inflicted.

"The averments as to the manner and cause of the injury are specific, and they do not sustain the conclusions embodied in the epithets, but clearly indicate that there was no wilful or intentional wrong." *Louisville, etc., R. W. Co.* v. *Schmidt*, *supra*.

At the conclusion of the evidence, after hearing the argument of counsel, the learned judge before whom the case was tried directed the jury to return a verdict for the defendant. A verdict was returned accordingly.

The right of the court to direct a verdict for the defendant, in case the plaintiff's evidence, giving it the most favorable construction it will legitimately bear, fails to establish any fact which constitutes an essential element in his right of action, is clear. *Purcell* v. *English*, 86 Ind. 34, and cases cited; *Hall* v. *Durham*, 109 Ind. 434; Thornton Juries and Inst., section 279.

The rule which governs in such cases is, substantially, that which controls where there is a demurrer to the evidence. If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, so that a verdict for the plaintiff, if one should be returned, would be set aside, the court may properly direct a verdict for the defendant without submitting the evidence to the jury. *Schofield* v. *Chicago, etc., R. W. Co.*, 114 U. S. 615; *Weis* v. *City of Madison*, 75 Ind. 241; *McClaren* v. *Indianapolis, etc., R. R. Co.*, 83 Ind. 319.

It is for the court to say whether, upon the evidence most

favorable to the plaintiff, an inference of liability *can* reasonably be drawn. It is for the jury to say, upon all the evidence submitted to them, under proper instructions from the court, whether liability *ought* to be inferred. If the established facts are such that no inference of liability can be drawn, the case ought not to be submitted to the jury. *Metropolitan R. W. Co.* v. *Jackson*, L. R. 3 App. Cas. 193; *Randall* v. *Baltimore, etc., R. R. Co.*, 109 U. S. 478.

It is practically conceded by appellant's counsel that the only question for discussion upon the evidence is, whether or not the injury was wilfully or purposely committed. The argument is directed to that question exclusively. But as has already been seen, the complaint presented no issue of a wilful injury. It is, therefore, wholly immaterial to consider the evidence in the aspect in which it is discussed.

We agree that wilfulness may be shown either by direct or indirect evidence, and that the unlawful intent may be either actual or constructive; but, even if the fact of wilfulness were in issue in this case, we can discover no evidence that there was either an actual or constructive intent to commit injury to any person at the time of the unfortunate occurrence which gave rise to this suit.

The decedent, with two other ladies, was walking *along* the railway track at a place where the public had no right to use the company's right of way, and without any invitation or license to do so. She and her companions chose the right of way rather than the street, because of the muddy condition of the street and the better facilities for foot travel afforded by the railway track. They were upon the track at a place where trains of cars were almost constantly passing, and where it was highly dangerous to be. If they were seen on the track by the engine driver on the approaching train, he had the right to assume that they would leave the track in time to avoid being injured, and he was not bound, in the absence of anything to indicate to him that they would not do so, to stop his train. This has been so often and so re-

cently decided by this court that we would not be justified in elaborating the reasons or citing authorities to sustain the proposition. *Palmer* v. *Chicago, etc., R. R. Co., supra; Cincinnati, etc., R. W. Co.* v. *Long, ante*, p. 166; Patterson Railway Accident Law, sections 199, 200, 205.

It follows that the decedent was, at the time of the injury which occasioned her death, a trespasser upon the railway company's track, and it not appearing, either by the issues presented or by the evidence given, that the injury was wilfully or purposely inflicted, the direction by the court that there should be a finding for the defendant was clearly right.

Judgment affirmed, with costs.

Filed Nov. 29, 1887.

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No. 13,017.

Bass et al. v. Doerman et al.

Supreme Court.—*Practice.—Motion to Dismiss.—Non-Compliance with Rule 19.*—Where there is a non-compliance with the provisions of rule 19 of the Supreme Court, which requires marginal notes to be placed on the transcript, etc., the appeal will not be dismissed for that reason in a case where the transcript is brief and the judgment below is called in question chiefly upon the sufficiency of the pleadings, and where it appears that the merits of the case have been fully discussed in the briefs of both parties before the filing of the motion to dismiss.

Laborers and Employees.—*Preference as Creditors.—Lien.—Suspension of Employer's Business by Act of Creditor.—Statute Construed.*—Under the provisions of section 5206, R. S. 1881, the laborers or employees of any company, corporation, firm or person engaged in manufacturing or mechanical business, or in the construction of any work or building, are preferred creditors of such employer or employers to an amount not

exceeding fifty dollars to each of such employees, for work done within the six months preceding, whenever the business of the employer has been suspended by any action of creditors, whether with or without the consent of the failing or insolvent debtor.

SAME.—Where a firm, engaged in manufacturing, being insolvent, and for the purpose of preferring a creditor, voluntarily conveys all its property to him, whereby the business of such firm is suspended, the laborers and employees thereof are preferred creditors to an amount not exceeding fifty dollars each, for work done within the six months preceding such conveyance, and the creditor sought to be preferred by the conveyance takes the property subject to the lien of such laborers and employees.

From the Allen Superior Court.

W. H. Coombs, *R. C. Bell* and *S. L. Morris*, for appellants.

H. Colerick and *W. S. Oppenheim*, for appellees.

HOWK, J.—On the 9th day of February, 1887, the appellees appeared herein and moved this court, in writing, "to set aside the submission of the above entitled cause and dismiss the appeal herein, for the reason that no marginal notes have been made on the transcript in this cause, as required by rule No. 19 of this court." Rule 19 has been in force for many years. It is declared therein, *inter alia*, that the appellant "shall also cause marginal notes to be placed on the transcript in their appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, if any, orders of the court, and the bills of exceptions; also, where the evidence is set out by deposition or otherwise, the names of the witnesses." The rule itself prescribes no penalty for the failure of an appellant to comply therewith. But the rule is a reasonable one and is easily complied with, and, in many cases, an observance thereof by the appellant will greatly facilitate the labors of this court. In some instances, this court of its own motion has set aside the submission of a cause for the want of marginal notes on the transcript. *Mitchell* v. *American Ins. Co.*, 51 Ind. 396; *Trueblood* v. *Nicholson*, 52 Ind. 419. In other cases, the court of its own

motion, or upon appellee's motion, has dismissed the appeal on account of the appellant's failure to comply with the requirements of rule 19, above quoted. *Beigh* v. *Smarr*, 62 Ind. 400; *Bowman* v. *Simpson*, 68 Ind. 229; *Kiley* v. *Perrin*, 69 Ind. 387.

Of course, the rule is one which the appellant ought to comply with in every case; but, in the event of non-compliance therewith, the action of this court must be governed by the facts shown by the record of each particular case. Where, as here, the transcript is brief and the judgment below is called in question chiefly upon the sufficiency of the pleadings, and it appears that the merits of the cause had been fully discussed in the briefs of counsel, as well of the appellees as of appellants, some time before the filing of the motion to dismiss, we are of opinion that the appeal ought not to be dismissed. Appellees' motion to dismiss the appeal herein is overruled.

Errors are assigned here by appellants, the defendants below, which call in question (1) the overruling of their separate demurrer to the complaint herein, (2) the sustaining of a demurrer to the third paragraph of their joint answer, (3) the rendition of judgment against them over their objection and exception, and (4) the overruling of their motion for a new trial.

This suit was brought by appellee Doerman and sixteen other named persons, for themselves, and for all other laborers who were creditors of the late firm of C. L. Olds & Co., and wished to come in and were willing to contribute to the expenses of this action, as plaintiffs, against appellants Charles L. Olds and William McLachlan, late partners under the firm name of C. L. Olds & Co., and John H. Bass and Henry G. Olds, as defendants. In their complaint, appellees alleged that, prior to the 26th day of February, 1885, appellants Charles L. Olds and William McLachlan were partners in the manufacture of engines, boilers, castings and machinery, under the firm name of C. L. Olds & Co., in the

city of Fort Wayne; that, within six months next preceding the date last named, C. L. Olds & Co. became indebted to each of the appellees, in a specified sum of money immediately following his name in the complaint, all of which sums were then due and owing the appellees from the firm of C. L. Olds & Co.; that all of the appellees were laborers and employees of the firm of C. L. Olds & Co., and the respective sums aforesaid due the appellees were all and wholly debts owing to appellees as such laborers and employees aforesaid, which accrued by reason of their labor and employment by and for the firm of C. L. Olds & Co., which labor and work were performed within six months next preceding the seizure of the property of said firm by the appellants John H. Bass and Henry G. Olds, who were creditors of the firm of C. L. Olds & Co. in the sum of, to wit, $25,000, for money loaned to said firm; that, on February 26th, 1885, the firm of C. L. Olds & Co. was insolvent, and was indebted unto laborers for work done in the sum of $4,000, to various other creditors in the sum of $10,000, and to appellants Bass and Henry G. Olds in the sum of $25,000; that, being threatened with suits by their several creditors, and being wholly unable to meet their liabilities, the firm of C. L. Olds & Co., for the purpose of preferring appellants Bass and Henry G. Olds, and at their special instance and request, conveyed and transferred all of the property of said firm, of the value of $25,000 (whereof a bill of particulars was filed with and made part of such complaint), to the appellants Bass and Henry G. Olds, and also all the individual property of the members of said firm, on the 26th day of February, 1885; that said firm and the individual members thereof, since the day last named, had been wholly insolvent, and at no time since such sale had any property; that, since such last named day, the business of the firm of C. L. Olds & Co. had been suspended by the action of appellants Bass and Henry G. Olds, creditors aforesaid; and that all the debts of the firm of C. L. Olds & Co.,

except the one owing to appellants Bass and Henry G. Olds, were due and unpaid. Wherefore appellees asked that they each might have a lien upon the firm property of C. L. Olds & Co., so conveyed as aforesaid, as preferred debts of such firm, to the amount of $50 each, if their claims amount to such sum, and, if not, for the full amount of their respective claims; and that such firm property be ordered to be sold, and that they be first paid, out of the proceeds, the sums so found to be a lien upon such firm property, and for other proper relief.

Appellants Bass and Henry G. Olds separately demurred to appellees' complaint herein for the following grounds of objection, namely: (1.) Because the complaint did not state facts sufficient to constitute a cause of action. (2.) Because of non-joinder of parties, in this, that all persons claiming to have or hold any like liens with those of plaintiffs should be made parties to this action. And, (3.) Because of misjoinder of causes of action, in that there did not exist any joint cause of action in favor of plaintiffs.

This demurrer was overruled by the court below, and to this ruling appellants Bass and Henry G. Olds at the time excepted. This ruling is the first alleged error of which appellants' counsel complain in this court, and it presents for our decision the following question, namely: Are the facts stated in the complaint herein sufficient to constitute a cause of action in favor of the appellees and against the appellants Bass and Henry G. Olds, or either of them, or against the property described therein, in their hands, of the late firm of C. L. Olds & Co.?

It is apparent from the averments of their complaint that appellees have endeavored to state therein their cause of action, within the purview and meaning of the provisions of an act entitled "An act to provide for the security and payment of laboring men and mechanics," approved March 29th, 1879, and in force since May 31st, 1879. This act contains a single section, known as section 5206, R. S. 1881, and reads

as follows: "Hereafter, when the property of any company, corporation, firm, or person engaged in any manufacturing or mechanical business, or in the construction of any work or building, shall be seized upon, upon any mesne or final process of any court of this State; or when their business shall be suspended by the action of creditors, or be put into the hands of an assignee, receiver, or trustee, then, in all such cases, the debts owing to laborers or employees, which have accrued, by reason of their labor or employment, to an amount not exceeding fifty dollars to each employee, for work or labor performed within six months next preceding the seizure of such property, shall be considered and treated as preferred debts, and such laborers or employees shall be preferred creditors, and shall be first paid in full; and if there is not sufficient to pay them in full, then the same shall be paid to them *pro rata*, after paying costs."

By this statute it is manifest that the General Assembly intended to provide that the laborers or employees of any company, corporation, firm or person engaged in any manufacturing or mechanical business, or in the construction of any work or building, to whom debts may be owing by or from their employer or employers, by reason or on account of their labor or employment, shall be preferred creditors of their employer or employers, and the debts so owing to them, to an amount not exceeding fifty dollars to each employee, for work or labor performed within six months next preceding the happening of one or more of the following events, shall be considered and treated as preferred debts, and shall be first paid in full, etc., namely:

1. When the property of such employer or employers shall be seized upon any mesne or final process of any court of this State.

2. When the business of such employer or employers shall be suspended by the action of his or their creditors. Or,

3. When the business of such employer or employers shall be put into the hands of an assignee, receiver or trustee.

We are of opinion that the provisions of this statute are just, wise and equitable, and should receive from the courts a fair and liberal construction. In their complaint herein appellees have stated facts which bring their case fairly within the spirit, meaning and intention, if not within the exact letter, of the statute above quoted, and were amply sufficient, as it seems to us, to withstand appellants' demurrer thereto for the alleged want of facts.

Appellees showed very clearly by the averments of their complaint that the business of their employers, the manufacturing firm of C. L. Olds & Co., by the action of their creditors, Bass and Henry G. Olds, the appellants herein, was entirely suspended, and that such firm, for the purpose of preferring Bass and Henry G. Olds, conveyed and transferred to them all the property of the firm and all the individual property of the members of such firm. We think that these averments sufficiently showed that the business of C. L. Olds & Co. was "suspended by the action of creditors," within the meaning of those words as used in the statute. Appellants' counsel insist that when the statute speaks of the suspension of business by the "action of creditors," it means a suspension of business resulting from a legal action, instituted by the creditors, which the debtors were powerless to resist, and not from the voluntary action of creditors without resort to law, and with the debtors' concurrence, or, at least, acquiescence, in such action.

This interpretation of the statutory provision quoted is entirely too narrow and forced to meet with our approval. When it is shown that the business of the employer has been suspended by any action of the creditors, whether with or without the consent of the failing or insolvent debtors, a case is made by the laborer or employee, we think, which to that extent comes within the meaning and intention of the statute quoted. Even if the action of the creditors, Bass and Henry G. Olds, which led to the suspension of business by the manufacturing firm of C. L. Olds & Co., was caused

or induced by the solicitation or express request of such firm, it must still be said that the business of the firm was suspended, within the meaning, purpose and intention of the statute, by the action of the firm's creditors Bass and Henry G. Olds. By such suspension of the firm's business, the appellees herein, as the laborers and employees of the firm, became and were, under the statute, preferred creditors of such firm, and the debts owing to them by the firm, described in their complaint herein, to an amount not exceeding fifty dollars to each of them, were to be considered and treated as the preferred debts of the firm, and the payment thereof, by force of the statute, became and was a preferred charge upon the assets and property of the firm. Appellants Bass and Henry G. Olds knew that, when C. L. Olds & Co. suspended their business, the debts owing by the firm to their laborers and employees had not been paid. Appellants also knew that the laborers and employees of such firm were, under the statute, preferred creditors of the firm, and that the debts so owing to them, to an amount not exceeding fifty dollars to each employee, were to be considered and treated as preferred debts, having priority, by force of the statute, over the indebtedness of such firm to appellants, or to either of them, or to any one else of the firm's general creditors.

When, therefore, appellants Bass and Henry G. Olds, with such knowledge on their part, accepted the conveyance and transfer, by the failing or insolvent firm of C. L. Olds & Co., of all the property of such firm, and took possession of such property, upon no other consideration therefor than the payment of the pre-existing and non-preferred indebtedness of the firm to such appellants, it must be held, we think, that appellants own and hold such property subject to the payment of the preferred debts so owing to appellees as the laborers and employees of such firm, to an amount not exceeding fifty dollars to each employee. *Warren* v. *Sohn*, *ante*, p. 213, and cases cited.

Upon the whole case, as presented by the record now before us, we are of opinion that appellees' suit herein was well brought, that their complaint stated sufficient facts to show that they were each entitled to the equitable relief they demanded against the firm property of C. L. Olds & Co. in the hands of the appellants, and that the trial court committed no error in the cause which authorizes or requires the reversal of the judgment herein.

The judgment is affirmed, with costs.

Filed Nov. 29, 1887.

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No. 12,773.

Carey et al. v. Hess.

Bankruptcy.—*Discharge.—New Promise.—Consideration.*—A promise by a bankrupt to pay, as soon as he is able, a debt suspended by his discharge in bankruptcy, revives such debt, and the creditor may enforce payment upon the happening of the contingency mentioned, the old debt being a valid and sufficient consideration for the new promise to pay it.

Same.—*Composition.—Secret Preference.—Fraud.* Where creditors unite in a composition agreement, a secret promise by the debtor to one creditor to pay him more than the others, or to pay him in full if he will consent to the composition, is void, and this doctrine applies to compositions in bankruptcy proceedings.

From the Hamilton Circuit Court.

D. Moss, R. R. Stephenson, J. A. Roberts and *W. R. Fertig,* for appellants.

J. Stafford, for appellee.

Elliott, J.—The first paragraph of the appellee's complaint alleges that, on the 3d day of February, 1878, the ap-

pellee recovered judgment against the appellant Sylvanus Carey for $3,901.93; that in that year the latter was adjudged a bankrupt on his own petition, and that in June of that year he made a composition agreement with his creditors, which was subsequently approved by the court of bankruptcy jurisdiction, and he was discharged; that, after the agreement of composition, the appellant Sylvanus Carey promised the appellee that as soon as he got able he would pay him the amount of the judgment, and did pay the sum of ten dollars to the appellee at one time and the sum of twenty-five dollars at another time; that the appellant is and has been for the last two years amply able to pay the indebtedness in full; that he is the owner of personal and real property of the value of twenty-five thousand dollars; and that the judgment remains unpaid.

The second paragraph of the complaint contains substantially the same allegations as the first, except that its allegations as to the new promise of Sylvanus Carey are, in substance, these: "That to induce the plaintiff to file his judgment, make the necessary proof in bankruptcy and release the lien of his judgment and preferences, and accept ten per cent., the amount agreed upon in the composition agreement, he, the said Sylvanus Carey, would, just as soon as he got able, pay the plaintiff's claim in full, and that as soon as he got rid of the Landers debt at ten cents on the dollar he would be able; that he would pay plaintiffs' judgment in full after he completed his compromise with his creditors."

In our opinion the first paragraph of the complaint is good. The debt due the appellee was a valid and sufficient equitable consideration for the new promise to pay it. *Wills* v. *Ross*, 77 Ind. 1 (40 Am. R. 279); *Proctor* v. *Cole*, 104 Ind. 373; 15 Cent. L. J. 386.

The discharge in bankruptcy suspended the original debt, but did not satisfy it, in whole or in part. The new promise revived the original debt, and the appellee has a right to enforce payment. *Wiggin* v. *Hodgdon*, 63 N. H. 39; *Lerow* v.

Wilmarth, 7 Allen, 463; *Cook* v. *Shearman*, 103 Mass. 21; *Corliss* v. *Shepherd*, 28 Maine, 550; *Otis* v. *Gazlin*, 31 Maine, 567; *Roberts* v. *Morgan*, 2 Esp. 736; *Trueman* v. *Fenton*, 2 Cowp. 544; *Birch* v. *Sharland*, 1 T. R. 715; *Brix* v. *Braham*, 1 Bingh. 281; *Kirkpatrick* v. *Tattersall*, 13 M. & W. 766; *Stilwell* v. *Coope*, 4 Denio, 225; *Donnell* v. *Swaim*, 3 Pa. L. J. 393; *Lannagin* v. *Nowland*, 44 Ark. 84; *Katz* v. *Moessinger*, 7 Bradw. 536; *Fraley* v. *Kelly*, 67 N. C. 78; *Knapp* v. *Hoyt*, 57 Iowa, 591 (42 Am. R. 59). These authorities decide not only that the new promise will revive the original debt, but, also, that the promise, although made before the discharge, is valid.

The conditional promise was valid and became enforceable when the contingency named happened—that is, when the appellant became financially able to perform his promise. *Way* v. *Sperry*, 6 Cush. 238 (52 Am. Dec. 779, n.); *Veasey* v. *Reeves*, 6 Ind. 406.

The second paragraph of the complaint is bad. It is a settled doctrine of equity jurisprudence, that where creditors unite in a composition agreement a secret promise by the debtor to one creditor to pay him more than the others is void. There is no reason why this settled doctrine should not apply to compositions in bankruptcy proceedings. There are, indeed, stronger reasons for its application in such cases than in any other, and the authorities do apply it to compositions in bankruptcy proceedings. *Blasdel* v. *Fowle*, 120 Mass. 447; *Tirrell* v. *Freeman*, 139 Mass. 297; *Woodman* v. *Stow*, 11 Bradw. 613; *Austin* v. *Markham*, 10 N. B. Reg. 548; *Bean* v. *Brookmire*, 7 N. B. Reg. 568.

In the complaint before us there appears something more than a secret preference, for it appears that the promise was made to induce the creditor to file his claim and agree to the composition, and this was a fraud on other creditors, since it tended to show that the ten per centum was the most that could be realized.

It is no doubt true that the plaintiff might have sued on

the original judgment, and to the plea of discharge have replied the new promise. *Way* v. *Sperry*, *supra*; *Cook* v. *Shearman*, 103 Mass. 21; *Farmers* v. *Flint*, 17 Vt. 508; *Badger* v. *Gilmore*, 33 N. H. 361 (66 Am. Dec. 729); *Van Dorn* v. *Bodley*, 38 Ind. 402; *Shockey* v. *Mills*, 71 Ind. 288. But he has not pursued this course. He has undertaken to anticipate the defence, and in this has failed, since he has stated, and not avoided, a valid defence. *Knopf* v. *Morel*, 111 Ind. 570.

The demurrer to the second paragraph of the complaint should have been sustained.

Judgment reversed.

Filed Nov. 29, 1887.

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No. 12,982.

Culver, Administratrix, v. Yundt.

Decedents' Estates.—*Claims.—Complaint.—Requirements of.*—Under the statute a formal complaint is not required in presenting a claim against a decedent's estate, but it is necessary that there shall be such a statement of facts as will show a legal liability on the part of the estate, and as will, with reasonable certainty, indicate to the representative of the estate what he is called upon to meet.

Same.—*Judgment.—Insufficient Complaint Upon.*—Where the claim filed against the estate of a decedent is founded upon a judgment against a gravel road company, and no facts are stated showing that the decedent was in any way a party to or interested in the judgment, other than the statement that one-seventh thereof is the proportionate share of the decedent, it is insufficient on demurrer.

From the Tippecanoe Circuit Court.

A. L. Kumler, for appellant.

G. O. Behm and *A. O. Behm*, for appellee.

ZOLLARS, J.—Appellant is the administratrix of the estate of Moses C. Culver, deceased. Appellee, claiming that the estate was indebted to him, filed as his verified claim or complaint the following:

"*Moses C. Culver to Paul Yundt, Dr.:*

"To his proportionate share of the balance due on a judgment for $2,268.05, rendered September 8th, 1874, in the Tippecanoe Circuit Court, in favor of Paul Yundt *v.* The Lauramie and Jefferson Gravel Road Company; amount of judgment $2,268.05; paid thereon $442.45, and leaving unpaid $1,825.60, one-seventh of which is the share of said Culver, $260.80, with 10 per cent. interest from September 8th, 1874."

To that claim or complaint a demurrer was filed by appellant, and overruled by the court below.

The statute in relation to filing claims against estates provides, as did those preceding it upon the same subject, that the claimant shall file a succinct and definite statement of his claim in the office of the clerk of the county in which the estate is pending. R. S. 1881, section 2310.

It has been held that, under those statutes, a formal and regular complaint, under the ordinary rules of pleading, was not and is not required. It has also been held that, to withstand a demurrer for want of facts, the statement of the claim must be succinct and definite, and contain all such facts as are necessary to show, *prima facie*, that the decedent's estate is lawfully indebted to the claimant. *Huston* v. *First Nat'l Bank*, 85 Ind. 21; *Windell* v. *Hudson*, 102 Ind. 521; *Moore* v. *Stephens*, 97 Ind. 271; *Walker* v. *Heller*, 104 Ind. 327.

While the statute does not require a formal complaint, it nevertheless requires such a statement of facts as will show a legal liability on the part of the estate, and as will, with reasonable certainty, indicate to the representative of the estate what he is called upon to meet. Hence it is that the statute requires that, if the claim be founded upon any writ-

ten instrument alleged to have been executed by the decedent, the original, or a complete copy thereof, shall be filed with the statement. And further, that if the claim be secured by a lien upon all or any part of the real or personal estate of the decedent, such lien shall be particularly set forth in such statement, and a reference given to where the lien, if recorded, will be found.

If the claim as filed were not required to be thus certain, the representative of the estate would be put to great disadvantage, and the estate might suffer loss for want of a proper defence. In the case before us the claim appears to be founded upon a judgment in favor of appellee against a gravel road company. There is nothing stated to show that the decedent was in any way a party to, connected with, or interested in, the judgment. The statements, "Moses C. Culver, Dr. to Paul Yundt, to his proportionate share" of the judgment, "one-seventh of which is the share of said Culver," are not statements of facts which show a legal liability, *prima facie* or otherwise, on the part of the estate; nor could the representative of the estate determine from them what he is required to meet. The estate may, or it may not, be indebted to appellee for a proportionate share of the judgment; but if there is any liability, such liability is dependent upon facts which are not stated. Culver was not a party to the judgment—at least, there is no averment that he was. How was he liable upon or for a judgment to which he was not a party? Was he a director of the gravel road company, or did he, for value, agree to pay a portion of the judgment? These are questions not answered by any statement in appellee's claim or complaint.

The demurrer to the claim or complaint should have been sustained. This court can not look to the evidence to determine that such an error is a harmless one. *Wilson* v. *Town of Monticello*, 85 Ind. 10; *Fleetwood* v. *Brown*, 109 Ind. 567; *Rush* v. *Thompson*, *ante*, p. 158.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the court below to sustain appellant's demurrer to the appellee's claim or complaint.

Filed Nov. 28, 1887.

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119	590
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127	150
127	409
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128	141
112	404
131	138
112	404
134	92
112	404
143	659
112	404
148	466
152	616
152	618
112	404
164	480
112	404
169	446

No. 12,576.

The Wabash, St. Louis and Pacific Railway Company v. Locke, Administrator.

Negligence.—*Purely Accidental Occurrences.*—Where an event takes place, the real cause of which can not be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences designated as purely accidental, and, there being no presumption of negligence in such cases, the party who asserts negligence must show enough to exclude the case from the class mentioned.

Same.—*Railroad Company.—Duty to Persons Lawfully Upon Its Grounds.*—A railroad company owes to one, not a servant of the company, who is lawfully engaged in loading a car upon its side-track, the duty to have its premises in a reasonably safe condition, and to prevent damage to him, and others having occasion to transact business with it, from any unseen or unusual danger of which it has knowledge, or by the exercise of reasonable vigilance and sagacity should have knowledge.

Same.—*Accidents Prima Facie Unavoidable.—Burden of Proof.*—The obligation of the railroad company does not require it to make its depot and grounds absolutely safe, and where the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence must show that the defendant has violated a duty incumbent upon it, from which the injury followed in natural sequence.

Same.—*Anticipation of Accident.*—The proper inquiry in such cases is not whether the accident might have been avoided if the company had anticipated its occurrence, but it is whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence by the use of such reasonable precautions as would have been adopted by prudent persons.

The Wabash, St. Louis and Pacific Railway Co. *v.* Locke, Administrator.

SAME.—*Structures and Appliances.—Failure to Anticipate Accident.*—When a structure or appliance, such as is in general use, and which is not inherently dangerous, has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it can not be said that a person has not acted with ordinary prudence if he fails to anticipate an accident which afterwards happens in its use when substantially in its usual condition.

SAME.—*Telegraph Wires Over Railroad Track.*—Where telegraph wires at a railroad station are stretched over the track, trains daily passing under them, the railroad company is only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business.

SAME.—*Displacement of Wire by Contact with Brakeman.—Injury to Third Person.*—A brakeman over six feet high was standing erect upon a moving freight car some inches higher than the average. In passing under telegraph wires stretched over the track, at the station, his head came in contact with a wire, which, from an unexplained cause, had become slackened, thus breaking the insulator and causing the wire to fall. It coiled around a man at work upon a flat-car twenty-five feet from the main track, and, catching upon a brake-handle of the moving train, dragged him from the flat-car and inflicted injuries resulting in his instant death. The tall brakeman and others had daily passed under the wires without thought of contact therewith, and apprehended no danger from that cause.

Held, that the accident was one which the railroad company was not bound to anticipate, and it is not liable.

SAME.—*Jury.—Province of.—Inference of Negligence.*—A jury can not arbitrarily infer negligence, but the evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken.

From the Wabash Circuit Court.

C. B. Stuart and *W. V. Stuart*, for appellant.

J. L. Farrar, *J. Farrar*, *H. J. Shirk* and *J. Mitchell*, for appellee.

MITCHELL, C. J.—Abia K. Locke, as administrator of the estate of John Bradley, deceased, brought this action against the Wabash, St. Louis and Pacific Railway Company and the

Western Union Telegraph Company to recover damages for wrongfully causing the death of Bradley.

There was a verdict against both defendants below, and a judgment against the railway company alone.

The evidence most favorable to the plaintiff tended to establish the following facts:

On the 14th day of November, 1882, John Bradley, a citizen of Wabash county, aged about forty-four years, was engaged with some workmen in loading logs on a flat-car, which stood upon one of the side-tracks on the south side of the railway company's main line at Keller's Station. The side-track upon which the flat-car stood was twenty-five feet distant from the main line, which ran east and west, there being also another track between the main line and side-track above mentioned. The depot was on the north side of the main line, and a short distance easterly from the place occupied by the flat-car.

The Western Union Telegraph Company had a line of telegraph poles of the usual height, which supported a number of telegraph wires, in the customary manner, running east and west along the south side of the railway company's right of way. In order to afford facilities for telegraphic communication to and from the station, the company carried some of its wires from a pole standing on the south side of the right of way, and west of the depot, and west of the point where the flat-car stood, diagonally across the tracks to a pole on the north side of the right of way, and thence eastwardly along the north side into an office in the depot building.

These wires had been placed across the track about the year 1874, and had been maintained substantially in the same position until the happening of the accident which gave rise to this suit. One of the wires was used by the railway company in its business. The others were employed in the business of the telegraph company.

While Bradley was occupied with his work on the flat-car, the location of which has been described, an east bound

freight train, running on its usual time, at a moderate rate of speed, approached the station over the main track. On one of the cars, which was of a height somewhat above that of an ordinary freight-car, stood a brakeman six feet three and one-half inches in height. His head came in contact with one of the wires which crossed the track in the manner above described, the wire striking the back of his head or neck, about the lower part of the ear. A slight bruise was the extent of the injury suffered by the brakeman. The effect of the contact was, however, to break the insulator on the south pole, thereby causing the wire to become detached from its place, and to fall down on the top of a moving car. One of the brake-handles which extended above the car to the usual height caught the wire and carried it forward with the moving train.

In falling, the wire in some unaccountable manner coiled around the body of Bradley as he stood on the flat-car, and, being carried eastward by the moving train, the wire dragged him from the car on which he stood, and eastward in the direction the train was proceeding, some 125 feet, inflicting injuries which resulted in his instant death.

So far, the facts are substantially undisputed, except that the brakeman who came in contact with the wire testified that the car upon which he stood was of the ordinary height, while witnesses for the plaintiff, not connected with the train, reckoned it to be from twelve to eighteen inches above an average.

The "tall brakeman," as he is described, testified that he had passed under the wires, standing erect on the top of the cars, almost daily for sixty days immediately preceding the accident, without thought of danger, and without supposing that he could touch the wires. He passed under it the day before, as he and many others had frequently done at other times, without stooping his head or apprehending danger. During all the years that the wires crossed the tracks, brakemen standing on cars of various heights had passed under

them many thousand times, and it had never been suggested or supposed that there could be any contact between persons standing on the top of trains and the telegraph wires. The superintendent of the telegraph line and the line repairers had passed along the line frequently and regularly, and had discovered no defect or displacement of the wires or fastenings at the place in question.

The record contains no direct notice of any kind from any source that the wires were dangerous. If there was any notice at all it was such as the structure itself and the position of the wires thereon afforded.

The evidence tends to show that one of two things made the accident possible. The plaintiff's case proceeded upon the theory that one of the telegraph wires had "sagged" some ten or twelve inches below its usual and proper height, and that a brakeman some inches taller than the average, standing erect on a car some twelve to eighteen inches above the ordinary height, came in contact with the depressed wire.

There was some evidence tending to show that one of the wires had presented the appearance of being slackened and somewhat lower than the other for some months prior to the accident. All the railroad and telegraph men, however, disputed this fact, the latter affirming that a "sagged" wire in the position of the one described could not have been used, and that these wires were all in daily use.

The defendant's theory was that the guy-wire which held the north telegraph pole in position had been broken or cut a short time prior to the accident, and that, on account of the breaking or cutting thereof, of which it remained ignorant until after the accident, the top of the pole was slightly pulled to the south, thus making contact with the wires possible under the peculiar circumstances of this case.

The jury adopted the plaintiff's theory. Assuming, therefore, that the evidence justified the jury in finding that one of the wires had by some means become lowered in the center, and that it continued in that position for a period of

six or eight months before the accident, so that a brakeman six feet three and one-half inches in height, standing erect on a freight-car from twelve to eighteen inches above the height of an ordinary car, might come in contact with the wire in the manner already described, and the question remains, was the railroad company bound to take notice that the wire created a condition of things such as it might reasonably have been anticipated would result in accident and injury to some one for whose safety the corporation was bound to take due and reasonable precaution?

Actions in tort, to recover for injury to persons or property, ordinarily arise out of, or are predicated upon, acts or omissions which are or may be classified under the following divisions:

1. The action may be brought to recover for an injury caused by an act which was done purposely and wilfully, without lawful excuse or justifiable occasion, and with the actual or constructive intent to produce harm.

2. The injury may have resulted from the commission of a distinct legal wrong, or from the failure to discharge some special or absolute duty which in itself constituted an invasion of the rights of, or an infraction of the obligation due to another, who was without fault; or an act done or omitted in violation of a positive statute may have resulted in injury to some one within the protection and purpose of the statute, who was without fault materially contributing to the injury; there being in either case no intent or expectation on the part of the defendant that injury would result from the act or omission. Or,

3. The injurious act or omission may not have been done or omitted with any intent to produce harm, nor in the invasion of any distinct or absolute legal right of another, nor in violation of any positive law or special or absolute obligation; nevertheless injury may have resulted therefrom which, in the exercise of due diligence and skill, might have been foreseen and prevented, and the person upon whom the injury

has fallen may have been one for whose safety and protection the defendant was at the time under some qualified or limited obligation. Pollock Torts, 19; Cooley Torts, 85; *Bennett* v. *Ford*, 47 Ind. 264; *Brown* v. *Kendall*, 6 Cush. 292.

It is important, therefore, in each particular case, that regard be had to the class within which the facts bring it. When the facts are such as to bring a case within either the first or second of the above divisions, the act itself constitutes the wrong, and fixes the right of action, leaving the amount of recovery to depend upon the injury which the evidence may show followed as a sequence of the act. "The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." *Lane* v. *Atlantic Works*, 111 Mass. 136.

True, if the question be whether or not the injurious act was purposely committed, it may aid in arriving at a conclusion to inquire whether or not the wrong-doer had knowledge of such facts as rendered it probable that he contemplated or anticipated, or was bound to anticipate, the result which followed. It remains true, nevertheless, as a general proposition, that the commission of the wrongful act, under the circumstances above supposed, fixes the right of action.

Where, however, an action is predicated upon an injury resulting from an act or omission which could only become tortious on account of the relations which the parties sustained to each other, and where the very substance of the wrong complained of itself was the failure to act with due foresight, then the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation, and upon showing further that the harm and injury complained of was such as a reasonable man in the defendant's place should have foreseen and provided against.

In such a case it is not enough to show that an accident happened, and that death or injury resulted therefrom.

Negligence is not to be presumed from the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional and extraordinary character.

This is not, therefore, a case in which mere proof of the accident casts upon the defendant the burden of showing the real cause of the injury. *Hammack* v. *White*, 11 C. B. (N. S.) 588 (593); *Baker* v. *Fehr*, 97 Pa. St. 70; *Nolan* v. *Shickle*, 3 Mo. App. 300; *Schultz* v. *Pacific R. R. Co.*, 36 Mo. 13, 32.

Where an event takes place, the real cause of which can not be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental; and in a case like this, where the plaintiff asserts negligence, he must show enough to exclude the case from the class of accidental occurrences.

It is true, the plaintiff's intestate was at the place where he sustained the fatal injury upon lawful business with, and in a sense upon the invitation of, the railroad company. The company, therefore, owed him the duty to have its premises in a reasonably safe condition, and to prevent damage to him, and all others having lawful occasion to transact business with it, from any unseen or unusual danger of which it had, or of which by the exercise of reasonable vigilance it should have had, knowledge. *Indermaur* v. *Dames*, L. R. 1 C. P. 274; *Gilbert* v. *Nagle*, 118 Mass. 278; *Pennsylvania Co.* v. *Marion*, 104 Ind. 239.

The relation and obligation of the parties are accurately expressed in the proposition found in the recent case of *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503, the substance of which is, that, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary prudence would recognize that if he did not use ordinary care and skill in his own conduct, with regard to these circumstances, he might cause injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The obligation of the railway company did not, however, require it to make the place absolutely safe. It was not required to make accidents impossible. Its duty was not to allow its depot and grounds, to and upon which people were invited to come, to become more dangerous than such a place would reasonably be, having regard for the necessities of its business and the nature of the contrivances necessarily employed in carrying it on.

The case, therefore, stands upon a different footing from the cases which involve the duties of carriers who contract to carry passengers safely to a particular destination. In such cases proof of an injury ordinarily establishes a *prima facie* case of negligence in favor of a passenger which the carrier must overcome. *Cleveland, etc., R. R. Co.* v. *Newell*, 104 Ind. 264 (54 Am. R. 312).

Where, as in the case under consideration, the obligation is not in its nature so nearly absolute, and the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has, by some act or omission, violated a duty incumbent on it, from which the injury followed in natural sequence. *The Nitro-Glycerine Case*, 15 Wall. 524; *Mitchell* v. *Chicago, etc., R. W. Co.*, 51 Mich. 236 (47 Am. R. 566); Patterson Railway Accident Law, section 373.

We are not unmindful of those cases in which it appeared that persons passing along public streets or highways had sustained injury by being struck with dangerous substances thrown, or by the falling of objects from buildings into public streets. It has been held that from the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed. These cases go upon the theory that the injurious thing was inherently and intrinsically dangerous, hurtful and insecure, and that it was hence necessary for the defendant to show that he was exercising reason-

able care at the time of the accident. *Mullen* v. *St. John*, 57 N. Y. 567 (15 Am. R. 530); Pollock Torts, 421.

Taking the admitted or established facts, and those most favorable to the plaintiff, and the inquiry in the present case must be, does it appear, or can it be inferred, that the railroad company failed to observe such precaution for the safety of the plaintiff's decedent, and others similarly situate, as ordinarily regulates the conduct of reasonable men? or can it be inferred from the evidence that reasonable men engaged in like business would have anticipated and provided against the accident which happened? If no such inference could properly have been drawn, then there was no wrong; the company was not negligent, and there is no liability.

"If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom." The party upon whom such an injury chances to fall, no matter how much our sympathies may be excited in his behalf, is necessarily left to bear it. *Lewis* v. *Flint, etc., R. W. Co.* 54 Mich. 55; *Bennett* v. *Ford, supra.*

Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, can not be taken into account as a basis upon which to predicate a wrong. "Now a reasonable man," says a recent learned author, "can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock Torts, 36.

The proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence,

but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence. *Beatty* v. *Central Iowa R. W. Co.*, 58 Iowa, 242 (8 Am. & Eng. R. R. Cases, 210).

The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which it may appear after the accident would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. *Chicago, etc., R. R. Co.* v. *Stumps*, 55 Ill. 367.

These principles are illustrated in a great variety of cases, some of which may with propriety be referred to more particularly.

In *Sjogren* v. *Hall*, 53 Mich. 274, the plaintiff, by some accident not explained, lost his leg by being caught in a wheel connected with the operation of a saw-mill in which he was employed. The plaintiff claimed that the defendant was negligent in leaving the wheel uncovered, and that at a very small expense the accident could have been prevented. COOLEY, J., delivering the opinion of the court, said: "If the accident which occurred was one at all likely to happen—if it was a probable consequence of a person working about the wheel that he would be caught in it as the plaintiff was,—there would be ground for pressing this argument. But the accident can not be said to be one which even a prudent man would have been likely to anticipate. * * * * So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injuries impossible." *Richards* v. *Rough*, 53 Mich. 212; *Mitchell* v. *Chicago, etc., R. W. Co., supra.*

So, in the case of *City of Allegheny* v. *Zimmerman*, 95 Pa. St. 287 (40 Am. R. 649), which was a suit to recover for injuries sustained by the falling of a liberty pole which had

been erected in the street, it was held, following the general rule, that "one is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature." *Fairbanks* v. *Kerr*, 70 Pa. St. 86; *Baker* v. *Fehr*, 97 Pa. St. 70; *Hoag* v. *Lake Shore, etc., R. R. Co.*, 85 Pa. St. 293 (27 Am. R. 653).

Loftus v. *Union Ferry Co.*, 84 N. Y. 455 (38 Am. R. 533), involved analogous principles. That was a suit predicated upon a charge of negligence in maintaining an insufficient guard on the side of a float used by passengers going upon and leaving the ferry-boat. In some manner, not clearly explained, a child, in leaving the ferry-boat in company with its mother, fell through or over the guard and was drowned. The float had been used for five or six years before the accident, and was similar to the floats at other ferries. Great numbers of persons had passed over it, and no accident had happened before. The court, giving judgment for the defendant, said: "It was possible for the defendant so to have constructed the guard, that such an accident as this could not have happened; and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. * * That this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty." *Dougan* v. *Champlain, etc., Co.*, 56 N. Y. 1; *Crocheron* v. *North Shore, etc., Co.*, 56 N. Y. 656; *Cleveland* v. *New Jersey, etc., Co.*, 68 N. Y. 306; *Burke* v. *Witherbee*, 98 N. Y. 562; *Marsh* v. *Chickering*, 101 N. Y. 396.

Crafter v. *Metropolitan R. W. Co.*, L. R. 1 C. P. 300, was a suit to recover for an injury occasioned by the plaintiff falling on a stairway, which the defendant's duty required it to keep in a safe condition. The cause of the slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe on account of the smooth condition of the nosing and the absence of a hand-rail. There was nothing to contradict this, except that great numbers of persons had passed over the stairs, and that no accident had ever happened before. Setting aside a verdict for the plaintiff, the court held there was no evidence of negligence. *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781; *Metropolitan R. W. Co.* v. *Jackson*, L. R. 3 App. C. 193; *Sharp* v. *Powell*, L. R. 7 C. P. 253.

In a very recent case it appeared that a passenger seated in a railway car was injured by the falling of a clothes-wringer from the rack above the seat, another passenger having placed it there. There was no evidence that the position of the wringer in the rack was such as to indicate that it was insecure, or that there was any reason to anticipate that an accident might happen. It was held that the failure of the trainmen to notice the wringer, or, if noticed, to order its removal, was not negligence. *Morris* v. *New York Central, etc., R. R. Co.*, 9 Cent. Rep. 288.

These cases, to a greater or less extent at least, go upon the theory that persons who are charged with a duty in relation to a particular matter or thing have a right to rely upon the sufficiency of a structure or contrivance, such as is in common use for the purpose, and which has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose. When a structure or appliance, such as is in general use, has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it can not in reason be said that a person has not acted with ordinary

prudence and sagacity in not anticipating an accident which afterwards happens in the use of the thing, notwithstanding it continued substantially in the same condition all the time. Of course, if the structure or thing was inherently dangerous, or had become intrinsically insecure, and the person who was responsible for its safety had actual or constructive notice of its condition, the fact that it had been used before without injury would not exempt the person so responsible from liability when an accident happened on account of its defective condition. So, also, if the thing which occasioned the accident was inherently dangerous or insecure, the fact that no such occurrence had ever taken place before would not be conclusive evidence that due caution was observed. Extraordinary and unusual occurrences are not to be as readily anticipated, under any circumstances, as are those which frequently happen.

The rule deducible from the authorities in cases analogous to the present is, that in order that liability shall attach for an injury occasioned by something not inherently dangerous and defective, which is found upon the grounds of, or in use by, one who is under a qualified obligation to the injured person, it must be shown that the defendant either knew, or that, by the exercise of such reasonable skill, vigilance and sagacity as are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains, he should have known of its defective and dangerous condition, and that the natural and probable consequence of its use would be to produce injury to some one. *City of Chicago* v. *Starr*, 42 Ill. 174; *Joy* v. *Winnisimmet Co.*, 114 Mass. 63; *Lane* v. *Atlantic Works*, 111 Mass. 136.

Is there anything in the evidence to show that a prudent person, prior to the unfortunate accident which gave rise to this suit, would have regarded the wires crossing the tracks in the manner described as a source of probable danger to persons at or about the railroad company's depot and grounds?

The evidence shows affirmatively that it was not so regarded. There is no law fixing the height at which telegraph wires shall be maintained at points where they cross railroads or other highways. Their height must, therefore, be regulated primarily so as not to put in jeopardy the safety of those who have occasion to pass under them by the customary modes, and, incidentally, so as not to unnecessarily expose others, who have occasion to come where they are, to danger.

A telegraph wire carried from one pole to another is not in and of itself a dangerous object. If it should become unfastened, or detached from one or more of the poles which carried the wire, and should fall to the ground or upon some one, it would not under ordinary circumstances put life or limb in jeopardy. It could only become a source of danger to persons other than those who came in contact with it, by some combination of circumstances or conjunction of forces beyond the telegraph wire itself.

Now, the railroad company was only bound to anticipate such combinations of circumstances, and accidents and injuries therefrom, as, taking into account its own past experience and the experience and practices of others in similar situations, together with what was inherently probable in the condition of the wires as they related to the conduct of its business, it might reasonably forecast as likely to happen.

Naturally, the first and chief consideration would be as to the height of the wires above the track, so as to make them safe for those whose duty required them to pass under on the top of trains. Upon this subject, what are the facts? All those connected with the railroad and telegraph service, including the "tall brakeman," unite in saying that it never occurred to any of them before the day of the accident that there was any danger, or that contact with the wires was ordinarily possible. On that day, by a combination of extraordinary circumstances, not at all satisfactorily explained, the brakeman already mentioned did what to him, and all others connected with the service, so far as the evidence

shows, seemed up to that moment impossible. He came unexpectedly in contact with the wire, with the result already mentioned.

Now, if any dependence is to be placed in the testimony of human witnesses, who are wholly uncontradicted, it is very clear that neither the brakeman who came in contact with the wire, nor any other employee of the railway company, could have maintained an action against it for an injury from the telegraph wires. This is so, because all of them testify that they passed under it daily and always considered it safe. As is said in *Burke* v. *Witherbee, supra*, a case closely analogous in principle: "Under such circumstances can the defendants be charged with negligence? Were they bound to know more than every one else? Ought they to have perceived danger that was not visible to any one else, and which those whose lives were most exposed were not sufficiently wise or vigilant to foresee?"

In *Baltimore, etc., R. R. Co.* v. *Rowan*, 104 Ind. 88, the liability of a railroad company for an injury to one of its brakemen, who came in contact with an overhead bridge, was made to depend upon the following propositions:

1. The maintenance of a bridge over the railroad track at an insufficient height to enable brakemen to discharge their duties in safety.

2. Knowledge by the railroad company that the bridge was dangerous.

3. Ignorance of the brakeman that it was dangerous for him to undertake the duties imposed upon him while passing under the bridge.

Every element of liability as set forth in the case cited is absent in the present case.

If, then, the railroad company maintained its track, and the wires crossing over it, so that it discharged its duty to those whose safety was directly and primarily involved, could it reasonably have anticipated an accident such as the one which happened?

There is no evidence in the record which enables us to answer this inquiry in the affirmative. Of course, we do not mean to say that there might not have been circumstances which would have defeated an action by the brakeman who came in contact with the wire, and yet have permitted a recovery by an injured third person. If, through the fault or negligence of the brakeman, the wire had been thrown down, and the injury of the decedent had resulted, there would be no doubt but that a recovery might be had. No one pretends, however, that the brakeman was in fault. His contact with the wire was wholly unexpected and a surprise to him.

He relied upon the fact that he had passed under it daily, and was, therefore, fully justified in supposing he could pass under safely again. That he acted as he did is a circumstance which indicates almost conclusively that his contact with the wire was the result of a combination of circumstances that the railroad company could not have foreseen. Upon the broadest assumption that the appellee makes of the facts, this must be so. Take it, and this is the most that it is claimed the evidence shows, that one of the wires "sagged" so that a brakeman some inches above the average height of men, happening at the moment of passing under the wire to stand erect upon a car some inches above the average height of cars, came in contact, by, say three to three and a half inches, with the wire, and can it be said that the company, notwithstanding this brakeman and all others supposed the wire to be above the possibility of contact, must have anticipated, not only the remarkable conjunction of the depressed wire with the tall brakeman erect upon a high car, but that it must have looked beyond the brakeman thus situate, and anticipated that the wire might be knocked down—which in itself would ordinarily have hurt no one—and that such a combination of circumstances would then follow as might result in serious injury to some one? Unless the rule is to be that everything which by any possibility may happen is to be anticipated and provided against, or that because

a thing has happened it must have been anticipated, there can be no liability on the facts proven in this case.

But it is said, finally, that it was the peculiar province of the jury to determine whether or not the railroad company was guilty of negligence in not anticipating and providing against the accident which resulted in the intestate's death. Hence, it is argued, the jury, having found a verdict for the plaintiff, must have determined that the railroad company was negligent, and, as this court under the rule can not weigh the evidence, that should be the end of the matter.

While it is quite true that it is the duty of the jury, under proper instructions, to determine whether or not upon any given state of facts negligence *ought* to be inferred, it is nevertheless the duty of the court first to say whether, upon the facts most favorable to the plaintiff, negligence *can* be inferred. It is settled law that the jury can not arbitrarily, and without evidence, infer negligence. "When the evidence fails to establish the defendant's duty, and its non-performance—that is, when the evidence is equally consistent with the existence or non-existence of negligence"—there is no evidence which justifies the jury in finding negligence. *Toledo, etc., R. W. Co.* v. *Brannagan*, 75 Ind. 490; *Searles* v. *Manhattan R. W. Co.*, 101 N. Y. 661; Patterson Railway Accident Law, section 373, and cases cited in note 5.

The evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken. *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228.

"The judge," said the Lord Chancellor in *Metropolitan R. W. Co.* v. *Jackson*, *supra*, "has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in

my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

The rule as thus stated has often been recognized by the courts of this country. *Randall* v. *Baltimore, etc., R. R. Co.*, 109 U. S. 478; *Gregory* v. *Cleveland, etc., R. R. Co.*, *ante*, p. 385; *Conner* v. *Citizens, etc., R. W. Co.*, 105 Ind. 62, and cases cited; *Woolery* v. *Louisville, etc., R. W. Co.*, 107 Ind. 381, and cases cited; Pollock Torts, 365.

We have been unable to discover any evidence in the record of the present case from which a reasonable inference can fairly arise that the railroad company had omitted any precaution which prudent persons engaged in like business would have taken.

There are other questions in the record, but as they may not arise again in case of another trial, if there should be one, we do not now consider them.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

Filed Nov. 30, 1887.

No. 13,057.

DAVIS *v.* HOOVER ET AL.

112 493
141 445
112 428
146 139

EXECUTORS AND ADMINISTRATORS.—*Power of Administrator With Will Annexed.*—It is a general rule that an administrator with the will annexed takes all the power under the will which would have devolved upon an executor, had one been named.

SAME.—*Sale of Real Estate.—Implied Power.*—If a testator directs that his real estate be sold, without declaring by whom the sale shall be made, the power to sell, if no contrary intention appears, vests in the executor, if the proceeds are distributable by him, or if the duties imposed with reference thereto are such as usually devolve upon an executor.

SAME.—*Order of Court.—When not Necessary.*—Under sections 2359 and 2360, R. S. 1881, it is not now, and has not been since the former section has been in force, necessary to obtain an order of court to authorize the sale of real estate specifically devised for the payment of debts or legacies.

SAME.—*Appraisement.—Presumption.—Destroyed Records.*—Where the will directs that real estate shall be appraised before sale, it will be presumed, after a sale by the executor or administrator, in the absence of proof to the contrary, where the deed purports to have been made in accordance with the will, and where the public records have been destroyed, that an appraisement was had. Acts of 1883, p. 109.

WILL.—*Construction.—Widow.—Rents and Profits.—Sale of Real Estate.*—Where, by one item of his will, a testator devises to his wife for life the rents and profits of his real estate, and by a subsequent item directs that the property be sold and the proceeds loaned for the benefit of his wife, the two provisions will be construed together and held to mean, that so long as the real estate remains unsold the widow shall have the rents and profits, and after sale the interest on the purchase-money.

From the Madison Circuit Court.

H. D. Thompson, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellees.

NIBLACK, J.—On the 11th day of June, 1867, Mary Davis, the appellant here, was the wife of Isaac Vanduyne, late of the county of Madison, in this State, who was, at the time, the owner of certain lots, hereinafter described, in the town of Alexandria, in that county. On that day Vanduyne

executed and published his last will and testament, the disposing part of which is as follows:

"Item 1. I give and devise to my beloved wife, Mary Vanduyne, for her natural life, all the rents and profits of the house and lots, and all the appurtenances belonging to the property, where I now live, viz.: lots Nos. 7 and 8 in block No. 10 in the town of Alexandria, Madison county, State of Indiana.

"Item 2. I also give my said wife the interest during her natural life of the following moneys, viz.: $300—$100 of which is at the date hereof loaned to Conrad Coon; the other $200 to Joseph Pugh; and I further bequeath unto my said wife, for the term of her natural life, the interest and profits of all other moneys or choses in action of which I may be possessed at my death.

"Item 3. I also give and bequeath to my children who may survive my wife all the above described property, to be equally divided between them at the death of my said wife.

"Item 4. I give and bequeath unto my wife all my household furniture and other property of which I may be possessed, not otherwise provided for, to have and to hold forever. It is my will that my said wife shall pay out of the moneys above mentioned all debts that may be outstanding against me at my death. It is also my will that the above described real estate be appraised and sold at private sale, the proceeds thereof loaned out, secured by mortgage on real estate, and the interest, after deducting necessary expenses, given to my wife as her own property, in accordance with item No. 1 of this will."

Vanduyne, the testator, died in September, 1867, leaving this will in full force, and without naming an executor.

On the 3d day of October, 1867, one Cyrenius Free caused the will to be duly proven and admitted to probate in the common pleas court of Madison county, and afterwards procured letters of administration with the will annexed to be issued to him. On the 2d day of October, 1868, Free, as

such administrator with the will annexed, but without any order of court authorizing him to do so, sold the real estate described in the will to one Joseph P. Miller for the sum of $700, being at the time its full value, and on that day, by a deed of conveyance in which he described himself as "executor of the last will and testament of Isaac Vanduyne, deceased," conveyed the said real estate to Miller, such deed, on its face, purporting to be made by virtue of, and in accordance with, said last will and testament, and being properly acknowledged and recorded. Miller paid the purchase-money and went into immediate possession. On the 16th day of August, 1883, Mary Hoover, the appellee, for a valuable consideration, purchased the real estate in question from a remote purchaser from Miller, and received a deed which, through intermediate conveyances, conferred upon her all the title acquired by Miller under his deed from Free, and with her husband, Valentine Hoover, in good faith, went into possession, which she still holds.

For several years after the real estate was sold and conveyed by Free to Miller, and up to the year 1882, the widow of Vanduyne, the testator, received from time to time from Free various sums of money on account of such real estate, ranging from $47 to $60 per year. Free died in the year 1882, after making the last payment to the widow. Mary Davis, the widow, having for some time thereafter received nothing further on account of such real estate, and claiming that she was, at her option, entitled to demand and receive the rents and profits thereof, commenced this action against Mrs. Hoover and her husband to have the real estate declared to be chargeable, under the will, with the payment of an annual rent to her, and to obtain a decree adjudging her claim for rent to be a lien on said real estate.

Mrs. Hoover and her husband answered in several paragraphs, and filed a cross-complaint demanding that the title of the former be quieted. Issues being joined, both upon the complaint and cross-complaint, the cause was tried upon an

agreed statement as to the facts upon which it rested, which was in substantial accordance with the statement here given, with the additional agreement that all the records and papers belonging to the common pleas court of Madison county, and all other court records of that county, were destroyed by fire on the 10th day of December, 1880, and that the rental value of the real estate in controversy was, and had been since August 16th, 1883, $75 per annum.

Upon the facts, as thus presented, the circuit court made a general finding for the appellees, and gave judgment in their favor on the complaint, and decreed that Mrs. Hoover's title be quieted upon the cross-complaint.

Questions were reserved, and are here made, upon some of the pleadings, as well as upon the sufficiency of the evidence to sustain the proceedings below; but as a proper decision of all depends upon the construction, in certain respects, which ought to be given to the will, which was read in evidence, we will consider only the question of the sufficiency of the evidence.

It is insisted that the propriety of selling the real estate described in the will rested with, or rather in the discretion of, the common pleas court of Madison county, and not with Free, and that hence the sale to Miller without an order of that court was void; that, conceding that an order of court was not necessary, the sale ought to have been held void because it was not affirmatively shown that the real estate was first appraised, as required by the will.

It was held in the case of *Landers* v. *Stone*, 45 Ind. 404, that the only practical difference between an executor and an administrator with the will annexed consists in the mode of their respective appointments—the first being named by the testator, and the latter by the court in which the will is proved. That is undoubtedly a correct statement of law as applicable to the duties ordinarily imposed upon an executor by the will. There may be an exception to this general rule, where a personal and peculiar trust and confidence is reposed

in an executor. Williams Ex. (7th ed.), bot. p. 461, and notes; *Farwell* v. *Jacobs*, 4 Mass. 634; 2 R. S. 1876, 530, section 93; R. S. 1881, section 2361.

The case before us falls within that general rule, and Free took all the power under the will which would have devolved upon an executor if one had been named.

In the construction of a general and indefinite direction of a testator for the sale of his property, Williams on Executors, above cited, says, at bottom page 655: "It sometimes happens that a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, *if the proceeds be distributable by the executor*, he shall have the power by implication. Thus, a power in a will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies." See, also, note *a*, and the cases there cited. This rule of construction is both reasonable and practicable, and is well supported by authorities.

The statute in force on the subject of the sale of devised real estate when Free sold that named in the will to Miller was as follows: "When real estate or any interest therein is devised by the will, or directed to be sold for the payment of debts or legacies, the executor shall proceed to dispose of the estate, and apply the same according to the provisions of the will." 2 R. S. 1876, 529, section 92; R. S. 1881, section 2359.

So far as we are advised, it has never been, and, as we believe, it ought not to be, held that, in cases falling within the provisions of this section of the statute, it was necessary to obtain an order of court to authorize the sale of real estate specifically devised for the payment of debts or legacies; and it is now expressly provided by section 2360, R. S. 1881, that it is not necessary, in such cases, to obtain such an order of court. The duties imposed upon some person

by the will under consideration were such as are ordinarily devolved upon an executor or administrator with the will annexed, and hence we conclude that Free, as such administrator with the will annexed, had the implied power to sell the real estate directed to be sold, and to invest and control the proceeds for the benefit of the widow; also, that he had power to sell and convey it without an order of court either authorizing or requiring him to do so. *Munson* v. *Cole*, 98 Ind. 502.

It is sometimes necessary to the sale of devised lands that an order of sale shall first be procured, but that is in a class of cases different from the one at bar. *Duncan* v. *Gainey*, 108 Ind. 579.

This court has held that, where a sheriff sells property on execution, subject to appraisement before sale, and his return is silent as to whether the property was appraised, the presumption will be indulged that the sheriff did his duty, and that an appraisement was made as required, in the absence of proof to the contrary. *Evans* v. *Ashby*, 22 Ind. 15; *Talbott* v. *Hale*, 72 Ind. 1; *Woolen* v. *Rockafeller*, 81 Ind. 208; *Jones* v. *Kokomo, etc., Ass'n*, 77 Ind. 340.

We regard the rule thus applied to a sheriff's sale as having an analogous, and, therefore, a proper application to such a sale as that made by Free to Miller, which it is likewise the policy of the law to uphold by every reasonable presumption of regularity.

It is enacted by the first section of the act of March 5th, 1883 (Acts of 1883, p. 109), "That whenever, heretofore or hereafter, any deed shall have been executed by any administrator, executor, guardian, sheriff, or commissioner of court, by virtue of any order, judgment, or decree of court, or by virtue of any will, or by virtue of any sale made upon any execution issued on any judgment, and the record of such order, decree of court, will, execution, or judgment shall have been destroyed by fire in the burning of any courthouse in this State, then such deed, or the record thereof,

shall be *prima facie* evidence of all the facts recited in such deed, and of the regularity and sufficiency of all the proceedings, records, and papers in virtue of which the deed was executed."

The deed from Free to Miller, in evidence in this case, purporting, as it does, to have been made by virtue of, and in accordance with, the last will and testament of the testator, Vanduyne, falls seemingly, and, as we think, fairly, within the spirit and purview of this statute, and hence carries with it the presumption, if it did not otherwise arise, that the real estate was first appraised as directed by the will. How far the provision of the will requiring an appraisement of the real estate ought to be construed as mandatory, and hence a condition precedent to its sale, presents a question which has not been discussed, and which, in consequence, we have not considered.

Considering the first and last items of the will before us together, we construe them to mean that so long as the real estate remained unsold the widow was entitled to receive the rents and profits resulting from it, but that it was the duty of the person charged with the execution of the will to sell the real estate within a reasonable time at its full or appraised value, and that thereupon the widow was to take the annual and accruing interest on the purchase-money instead of the rents and profits.

The widow appears to have acquiesced in this construction for a period of near, if not quite, fourteen years, and we see no ground upon which she can now be permitted to successfully insist upon a different construction.

The designation of Free as "executor" in the deed to Miller was, under the circumstances attending it, only a mere clerical, and, therefore, immaterial, misdescription of the character in which he conveyed the real estate. *Downie* v. *Buennagel*, 94 Ind. 228.

The judgment is affirmed, with costs.

Filed Dec. 2, 1887.

112	430
116	398
116	411
118	269
119	290
121	281
121	306
123	333
112	430
126	57
127	270
112	430
130	40
130	482
112	430
131	299
112	430
139	610
112	430
145	603
112	430
149	16
112	430
155	676
112	430
160	528
160	530

No. 13,542.

Bartholomew v. Pierson.

Mortgage.—*Husband and Wife.—Tenants by Entireties.—When Mortgage Void.*—A mortgage executed by a husband and wife upon land owned by entireties is void, under section 5119, R. S. 1881, if the wife executed it as surety for her husband, but valid if the money obtained is for the benefit of the joint estate.

Same.—*Foreclosure.—Cancellation.—Wife's Suretyship.—Cross-Complaint.—Burden of Proof.*—If, in a suit to foreclose such a mortgage, the wife by cross-complaint alleges her suretyship and asks a cancellation of the mortgage, the burden is upon her to show its invalidity for the cause mentioned.

Same.—*Special Finding as to Suretyship.*—Where there is a finding merely that the wife signed the mortgage to enable her husband to obtain the money advanced thereon, and not to obtain the money for herself, and that the husband received the money, a conclusion of law that the mortgage is void and should be cancelled is not warranted, in the absence of a finding of the ultimate fact that the wife signed as surety.

Special Finding.—*Statements of Evidence.—Surplusage.*—Statements of evidence in a special finding of facts will be treated as surplusage, and disregarded.

From the Hendricks Circuit Court.

E. G. Hogate and *R. B. Blake*, for appellant.

T. T. Moore and *J. V. Hadley*, for appellee.

Zollars, J.—Appellant, by this action, seeks to foreclose a mortgage and recover a personal judgment upon a promissory note. Upon a proper request, the court below made a special finding of the facts. The facts so found are substantially as follows:

On the 15th day of February, 1883, appellee and her husband, since deceased, executed the note and mortgage in suit. The mortgage is upon land which appellee and her husband owned as tenants by entireties. At the time of the execution of the note and mortgage, and in consideration thereof, appellant signed and delivered to the husband a check on a bank for $600, setting out the check, the amount

of which was paid to the husband by the bank. Appellee "received no part of the money thus obtained. * * She signed the note and mortgage in order that her husband, William H. Pierson, might obtain said money, but not for the purpose of obtaining any money for herself." Upon the facts thus found and stated, the court concluded and adjudged as a matter of law that, as against appellee, the note and mortgage are void, and that appellant is not entitled to recover upon either; and, further, that appellee is entitled to have the same cancelled, as she asks in her cross-complaint.

The first question for decision here is, are the conclusions of law correct upon the facts found? That the check was delivered to the husband and made payable to him is an evidentiary fact rather than the ultimate fact to be found. And while it may tend, in some degree, to show that the loan was made to the husband, it is by no means conclusive of that fact. So far as the ultimate rights of the parties are concerned, it is immaterial, except as a matter of evidence, to whom the check was made payable, or who received the money upon it from the bank. The statements in relation to the check and the payment of it to the husband are statements of evidence and have no proper place in the finding of facts. They should be regarded as surplusage, and disregarded in passing upon the finding of facts. *Ward* v. *Berkshire Life Ins. Co.*, 108 Ind. 301 (307); *Indianapolis, etc., R. W. Co.* v. *Bush*, 101 Ind. 582; *Pittsburgh, etc., R. W. Co.* v. *Adams*, 105 Ind. 151.

The mortgage executed by appellee and her husband upon the land which they owned as tenants by entireties was not necessarily void, either at common law or under our statutes. *Dodge* v. *Kinzy*, 101 Ind. 102 (106); *McLead* v. *Ætna Life Ins. Co.*, 107 Ind. 394 (397); *Fawkner* v. *Scottish, etc., Co.*, 107 Ind. 555.

Under our statute, section 5119, R. S. 1881, both the note and mortgage are void as to appellee, at her pleasure, if she executed them only as surety for her husband. See cases

above cited; also, *Crooks* v. *Kennett*, 111 Ind. 347, and cases there cited.

By her cross-complaint appellee asked to have the note and mortgage cancelled, on the ground that she executed them as surety for her husband, and for no other purpose and in no other capacity. Whatever might be said, did this action involve nothing more than appellant's claim to a judgment and a foreclosure of the mortgage, we think that it must be held that as to her cross-complaint the burden was upon appellee to show that the note and mortgage were, and are, invalid as to her by reason of her having executed them as surety for her husband.

The conclusions of law by the court below can not be sustained, unless it appears from the finding of facts that she thus executed the note and mortgage as surety for her husband.

We do not think that the ultimate fact of suretyship is sufficiently shown by the finding of facts to justify the conclusions of law based thereon. There is no finding of the ultimate fact, as a fact, that appellee executed the note and mortgage as surety for her husband only.

It is found that she executed them in order that her husband might obtain the money, which he did receive upon the check, and not for the purpose of obtaining any money for herself. The facts thus stated, if they can be regarded as anything more than evidence, do not amount to a finding of the controlling and ultimate fact that she executed the note and mortgage as surety only. That she thus executed the note and mortgage is not a necessary inference from the facts stated. The facts thus stated do not necessarily exclude the idea that she may have executed the note and mortgage in order that her husband might obtain the money for the benefit of their joint estate—as, for example, to improve the joint estate, to pay a debt incurred in its purchase, or to remove therefrom a lien which was valid and binding as against both appellee and her husband. See *Western Union Tel. Co.*

v. *Brown*, 108 Ind. 538; *Stix* v. *Sadler*, 109 Ind. 254, and cases there cited; *Buchanan* v. *Milligan*, 108 Ind. 433.

If the money was obtained by the husband for the purposes suggested, it could not be said that appellee executed the note and mortgage as his surety only.

We feel constrained to hold that the conclusions of law by the court below are not warranted by the facts found.

The judgment must, therefore, be reversed; and as it is apparent that the rights of the parties will be better protected by ordering a new trial, the judgment is reversed, at appellee's costs, and the cause remanded, with instructions to the court below to award a new trial. See *Western Union Tel. Co.* v. *Brown*, *supra*; *Buchanan* v. *Milligan*, *supra*.

Filed Nov. 30, 1887.

No. 14,040.

Stevens v. The State.

Criminal Law.—*Brothel.—Taking Infant Female to.—Procuring Her to Have Intercourse With Men.*—One who takes his daughter, under eighteen years of age, to a brothel and instructs or commands her to have sexual intercourse with men who visit the place, which she does, is guilty of the offence prescribed by section 2001, R. S. 1881.

From the Wayne Circuit Court.

J. W. Henderson and *W. H. Ogborn*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

Elliott, J.—The evidence in this case conclusively shows, for there is no semblance of conflict, nor any pretence of ex-

planation, that the appellant took his daughter, fifteen years of age, to a brothel, and instructed her—indeed, commanded her—to have sexual commerce with men, and to give him the money she earned as the wages of her sin and shame. Part of this money he did receive.

It is contended by his counsel that there is no case made out under section 2001, R. S. 1881, because it is not shown that the intention of the appellant was to decoy, induce, procure, or compel the child to have intercourse with a particular person.

We do not think it was necessary to prove that the accused was influenced by such a purpose. It was enough to prove that he decoyed, induced, procured, or compelled her to have intercourse with another than himself, for it is not essential that the intention should be to induce the female to submit to the embraces of a particular person, known and selected at the time she was decoyed into the place where she submitted to the carnal intercourse. If the accused did procure and induce the girl to have carnal intercourse with men he is guilty, although he may not have had in mind any particular man, or men, at the time he took her to the brothel.

The case made by the evidence is so revolting as to be almost incredible, but not a syllable of explanatory or contradictory evidence was given, and we think the jury were fully warranted in convicting the appellant.

Judgment affirmed.

Filed Nov. 30, 1887.

113	435
112	45
113	495
114	345
115	161
115	389
116	66
120	253
112	435
161	511
112	435
d104	684
112	435
171	672

No. 12,856.

KOPELKE *v.* KOPELKE.

BILL OF EXCEPTIONS.—*Practice.—Leave of Court for Time in Which to Prepare Bill.*—Where, upon the overruling of a motion for a new trial, exceptions are taken at the time, and on the same day leave of court is asked and granted for a specified period of time beyond the term in which to file a bill of exceptions, within which time it is filed, it is properly in the record, although other proceedings in the cause intervened between the time of taking the exceptions and the leave of court granted for the filing of the bill.

SUPREME COURT.—*Verdict not Disturbed if Supported by Any Evidence.—Practice.*—The verdict of a jury, which has met the approval of the trial court, will not be disturbed by the Supreme Court on the evidence merely, unless the record shows an absolute failure of evidence on some material point.

PROMISSORY NOTE.—*Rate of Interest.—Lex Loci Contractus.*—Where promissory notes, in which no interest is specified or contracted, are executed and payable in another State, or at some specified place therein, the liability of the maker as to all matters contracted for therein is governed and measured by the laws in force in that State.

SAME.—*Place of Payment.—Interest.—Damages.—Lex Fori.*—Where, however, promissory notes are payable generally, no place of payment being fixed, the general rule is that the *lex fori* governs in the collection thereof; and where no interest has been provided for therein, the interest recoverable after a breach of the contract is recoverable, if allowed, as damages; and where interest is adjudged as damages upon such contracts, the rate of interest will be governed by the law of the place of suit.

INSTRUCTIONS TO JURY.—*Special Finding of Facts—Request for.—Discretion of Court.—Practice.*—The question as to the time when a party shall make a request of the court to instruct the jury to find specially upon particular questions of fact, if they render a general verdict, is left by the code to the sound discretion of the trial court, and in the absence of an abuse of such discretion the action of that court will not be interfered with on appeal.

From the Jasper Circuit Court.

M. F. Chilcote, for appellant.

E. P. Hammond, for appellee.

HOWK, J.—In this case, errors have been assigned here by appellant, the defendant below, as follows:

1. The court below erred in overruling his motion for a new trial.

2. Error of the court in rendering judgment for appellee, over appellant's objections, for $503.66 and costs, the same being too large.

The point is made by appellee's learned counsel, and is pressed with much earnestness, that the bill of exceptions containing the evidence "is not properly in the record." If counsel is correct in this position, it is manifest that no question would or could be presented for our decision by the record of this cause and the errors assigned thereon by the appellant. Upon this point counsel says: "We claim the bill of exceptions is not in the record, because, at the time of overruling the motion for a new trial, time was not *then* given by the court in which to reduce the exception to writing." Upon this subject our civil code of practice, in section 626, R. S. 1881. provides as follows:

"The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court: * * * *Provided*, That if a motion for a new trial shall be filed in a cause in which such decision, so excepted to, is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion, and time may be then given by the court within which to reduce such exception to writing."

It is shown by the record of this cause that, on the 7th day of November, 1885, the same being the 18th judicial day of the October term, 1885, of the court below, the appellant filed his written motion for a new trial herein, "which motion the court now overrules, to which ruling of the court said defendant (appellant) excepts." Immediately following the language last quoted, the order-book entry of the same day's proceedings of the court in this cause, as copied into the record now before us, shows the judgment below in ap-

pellee's favor and against appellant for the damages assessed and costs, and then proceeds as follows: "And now said defendant objects to the rendering of said judgment on the ground that it is too large. And the defendant also calls the attention of the court to the answers of the jury herein to the interrogatories and the pleadings filed in this cause. And said defendant now prays an appeal to the Supreme Court, which appeal is granted by the court, on his filing his appeal bond within thirty days from this date, in the penalty of $750, with John Douch as surety therein, which bond and surety are approved by the court. And said defendant has leave of court, until and including the second day of the next term of this court, to file his bill of exceptions."

The entry of the proceedings of the court in this cause clearly shows that appellant excepted to the overruling of his motion for a new trial at the time such decision was made. But time was wanted by appellant beyond the term to reduce his exception to writing, and prepare and file his bill of exceptions. It is claimed by appellee's counsel, as we understand his argument, that in such case time must be asked for and given, at the time the decision is made and excepted to, within which to reduce the exceptions to writing. Counsel says: "If, as in the present case, other things, as the rendition of a judgment, objections to the judgment, praying and granting an appeal to the Supreme Court, approving the penalty and surety of a proposed appeal bond, and fixing the time in which the same is to be filed, intervene between the exception to the overruling of the motion for a new trial and the granting of time in which to file the bill of exceptions, then the last proceeding comes too late."

It seems to us, however, that appellee's learned counsel, in what we have last quoted from his brief herein, has placed a construction upon the language of section 626, above quoted, entirely too rigid for the purposes of a liberal practice. The authorities cited by counsel on this point, we think, lend no support whatever to his argument.

In *Jones* v. *Van Patten*, 3 Ind. 107, *Coan* v. *Grimes*, 63 Ind. 21, and *Dickson* v. *Rose*, 87 Ind. 103, it was simply held that, in the language of the statute, "the party objecting to the decision must except at the time the decision is made."

In *Goodwin* v. *Smith*, 72 Ind. 113, which was an application for a license to retail intoxicating liquor, the trial court having struck out the remonstrance filed before the county board, afterwards, over the applicant's objection, permitted the remonstrants to file an amended remonstrance, to which action of the court the applicant at the time excepted. On appeal, it was held here that the bill of exceptions did not properly present the action of the court complained of, because it did not contain the original remonstrance; and it was added that it did not appear that time had ever been given to reduce the exception to writing.

In *Alcorn* v. *Morgan*, 77 Ind. 184, the exception was not reduced to writing at the time the decision was made, nor was time ever asked for reducing the exception to writing; but after the close of the term a bill of exceptions was filed, and it was held that such bill did not present the decision complained of.

In *Boyce* v. *Graham*, 91 Ind. 420, it was held that "the bill of exceptions filed within the time allowed for the filing of bills upon the overruling of the motion for a new trial does not take up and embrace motions made during the framing of issues in cases where the bill is not filed during the term."

We have now examined all the cases cited by appellee's counsel upon the question under consideration, and have shown, we think, that in none of them does the point actually decided lend any support to the position of counsel or his argument in the case in hand.

Counsel has cited us to no case, and we know of none, in which it has been held that where, as here, the order-book entry of the same day's proceedings of the court in the cause shows the decision complained of, the exception thereto at

the time, and the leave of court for a specified period of time in which to file the bill of exceptions, the leave granted for the last named purpose will come too late, and be of no avail, if it appear from such entry that other things or steps in the cause have intervened between the exception to the decision and the giving of time to reduce the exception to writing. Such a decision is not required by any fair construction of the provisions of section 626, above quoted. The order-book entry in the cause, the substance of which we have heretofore given, sufficiently shows that not only did the appellant except at the time to the overruling of his motion for a new trial, but that time was then given him to reduce the exception to writing beyond the term by special leave of the court. Within the time so given the bill of exceptions was filed. It is, therefore, a proper part of the record of this cause, and must be considered as such in the decision of the questions presented by the error assigned by appellant upon the overruling of his motion for a new trial.

Before considering any of the questions presented for decision, it may be premised that this suit was commenced in the Lake Circuit Court on June 16th, 1882, by the appellee against the appellant. Appellee's complaint counted upon two promissory notes, alleged to have been executed by appellant and payable to appellee, one for $200, dated February 2d, 1876, due in two years from date, and the other for $100, dated June 29th, 1876, due in one year after date; which notes, it was alleged, were then unlawfully in appellant's possession, or had been unlawfully destroyed by him, and, therefore, copies thereof could not be filed with the complaint, etc.

In another paragraph appellee sued appellant upon an open account for cash, amounting in the aggregate to $147. Appellant answered by a general denial of the account, and to the notes in suit he pleaded want of consideration and, also, an accord and satisfaction; and he filed a set-off, based upon his services as an attorney rendered appellee in Michigan.

Appellee replied by a general denial. The venue of the cause was changed to the court below, and the issues joined were there tried by a jury, and a general verdict was returned for appellee, assessing his damages in the sum of $503.66; and over appellant's motion for a new trial judgment was rendered accordingly.

A number of causes for a new trial were assigned by appellant, in his motion therefor. His counsel has devoted a considerable portion of his argument to the discussion of the alleged insufficiency of the evidence to sustain the verdict. It is not claimed that there is no evidence in the record tending to sustain the verdict on every material point; but an elaborate effort is made to show that the statements of appellee, who was a witness on the trial, in regard to his dealings with appellant, were inconsistent, contradictory and unworthy of belief. These were matters for the consideration of the jury and the trial court, whose opportunities for determining as to the credibility of a witness in the cause, and as to the proper weight to be given to his testimony, are far better than those of an appellate court. It has long been settled by our decisions that the verdict of a jury which has met the approval of the trial court will not be disturbed here on the evidence merely, unless the record shows an absolute failure of evidence on some material point. *Fort Wayne, etc., R. R. Co.* v. *Husselman*, 65 Ind. 73; *Cornelius* v. *Coughlin*, 86 Ind. 461; *Beck* v. *Bundy*, 92 Ind. 145.

Appellant's counsel earnestly insists that the jury erred in their assessment of the amount of appellee's recovery, and that the damages assessed were excessive, in that the jury, as shown by their answers to the interrogatories propounded to them, allowed appellee six per cent. interest on the notes in suit after their respective maturity; whereas, as counsel claims, appellee was not entitled under the law to any interest on such notes. This conclusion is arrived at by counsel, and is sought to be enforced here, by arguments more ingenious than forcible. The notes were executed in the

State of Michigan; they were payable generally, and no place of payment nor rate of interest was specified therein. It is contended by appellant's counsel that the notes in suit were Michigan contracts, and that the questions as to whether the notes would bear interest after maturity, and, if so, at what rate, could only be decided by the laws of Michigan; or, in other words, that the *lex loci contractus*, and not the *lex fori*, must govern in the decision of those questions. It is further contended that, as no statute of Michigan on the subject was either pleaded or given in evidence, we must presume that the common law prevailed in that State; and that at common law the right to recover interest for the loan or forbearance of money had no existence.

The fundamental error in the contention of appellant's counsel, upon the question we are now considering, as it seems to us, lies in the assumption (1) that the notes in suit are, strictly speaking, Michigan contracts, and (2) that if they were such contracts the rate of interest thereon (no interest being specified or contracted for therein) would be governed by the statutes of the State of Michigan, and not by the laws of the State wherein they were sued upon. If the notes in suit had, in terms, been made payable in the State of Michigan, or at some specified place therein, it might well be said, we think, that they were Michigan contracts, and that appellant's liability thereon, as to all matters contracted for therein, should be governed and measured by the laws in force in that State. This is the doctrine of our decisions. *Hunt* v. *Standart*, 15 Ind. 33 (77 Am. Dec. 33); *Browning* v. *Merritt*, 61 Ind. 425; *Gray* v. *State, ex rel.*, 72 Ind. 567.

Here, however, the notes sued upon were not, in terms, made payable at any specified place in the State of Michigan or elsewhere. One of them was dated at Ann Arbor, Michigan, and the other was dated at Crown Point, in this State, but both of them were delivered to appellee, the payee thereof, in the State of Michigan. They were each payable

generally, and each of them was wholly silent upon the subject of interest. Notes thus payable are payable everywhere, and as a general rule the *lex fori*, and not the *lex loci contractus*, governs in the collection thereof. *Engler* v. *Ellis*, 16 Ind. 475.

Upon such notes, where no interest has been contracted for, the interest recoverable after the breach of the contract is recoverable, if allowed, as damages; and, where interest is adjudged as damages upon such contracts, the rate of interest will be governed by the law of the place of the suit. *Shaw* v. *Rigby*, 84 Ind. 375 (43 Am. R. 96); *Goddard* v. *Foster*, 17 Wall. 123; *Porter* v. *Munger*, 22 Vt. 191, 196; Bishop Cont., section 741; Story Conf. of Laws (7th ed.), section 296*a*; sections 5198 and 5200, R. S. 1881.

A large number of rulings of the court below, in relation to the admission or exclusion of offered evidence, were excepted to at the time by the appellant, and were severally assigned by him as causes for a new trial in his motion therefor. These rulings have been ably and elaborately discussed by the learned counsel of appellant and appellee. We have carefully examined and considered each of the rulings complained of, and the arguments of counsel for and against the same, and we have reached the conclusion that there is no such error in any of such rulings as would authorize or require the reversal of the judgment. To set out and comment on these rulings separately would extend this opinion to an unreasonable length, and we fail to see that any good purpose would be subserved thereby. The objections urged to some of the rulings complained of seem to us almost trivial, and we think that none of such rulings were erroneous.

The trial court, at appellee's request, submitted to the jury a number of questions of fact to be answered by them if they rendered a general verdict. Appellant objected to the submission of such questions to the jury, for the reason that they had not been submitted in time, and because he and his counsel had no time then to consider them. The court overruled

such objection, and announced that it would require the jury to answer such questions, to which action of the court appellant at the time excepted.

It is claimed by appellant's counsel that this action of the court was error, for which the judgment below should be reversed. It is shown by the record that, after the evidence was all given, and before the argument was commenced, appellee's counsel handed such questions of fact to the court, and asked that the jury should be required to answer the questions if they rendered a general verdict, and that none of such questions had, before that time, been shown to appellant or his counsel.

Our code provides that the trial court, "in all cases, when requested by either party, shall instruct them," (the jury) "if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing." Section 546, R. S. 1881.

It will be seen from these provisions that the code, while it imperatively requires the court, at the request of either party, to instruct the jury, if they render a general verdict, to find specially upon particular questions of fact stated in writing, does not prescribe the time when such request shall be made, or when such written questions of fact must be presented to the court. Manifestly, these matters are left by the code, and properly so, we think, to the sound discretion of the trial court. We can not say that the court, in its action now complained of, abused its discretion, nor can we say that such action was erroneous.

Appellant also objected specially to seven of the questions of fact, by their numbers, "for the reasons that each was impertinent, presented matters to the jury that were not within the issues, and thereby misdirected their minds, called for the opinion of the jury on immaterial subjects, presented matters of law to them for their decision, and presented to them the question of the plaintiff's intention as the one determining the decision of the case."

Appellant's objections to the questions numbered were overruled by the court, and to this ruling he excepted at the time. We are of opinion that there is no available error in this ruling of the court. A careful examination of each of the questions of fact specially objected to has led us to the conclusion that the reasons assigned by appellant in support of such objections were not applicable to any one of such questions of fact, and that his objections, therefore, were correctly overruled as to all such questions.

Appellant's counsel complains of the refusal of the court to instruct the jury, at his request, to the effect, substantially, that, if they found for appellee upon the notes in suit, he could not recover any interest thereon. We have already said all that we desire to say on this interest question. Under the law of this State, which, as we have seen, governed the decision of this question in our courts, appellee was entitled to recover interest upon the notes in suit, after their maturity, as damages, "at the rate of six dollars a year on one hundred dollars." Section 5200, *supra*. There was no error, therefore, in the court's refusal to instruct the jury as requested by appellant.

Appellant's counsel also complains in argument of some instructions given by the court of its own motion, and of other instructions given at appellee's request. It is settled by our decisions that the instructions of the court to a jury must be considered here with reference to each other, and as an entirety; and if, when thus considered, they contain a full, fair and correct statement of the law applicable to the issues and the evidence in the cause, and are not calculated to mislead the jury, the judgment will not be reversed because of mere inaccuracies or loose expressions in such instructions separately considered. *Deig* v. *Morehead*, 110 Ind. 451, and cases cited.

Applying this doctrine to the instructions given in the case under consideration, after a thorough examination of all the instructions given by the court of its own motion and at the

request of the parties respectively, we are of opinion that, as an entirety, they presented the law of this case to the jury fully and fairly to the appellant as well as the appellee, and that there was no error in any of such instructions which would authorize or require the reversal of the judgment.

The cause seems to have been fairly tried. The matters in controversy depended for their decision in the main upon the testimony of the parties to the record; and they differed, *toto cœlo*, in their testimony in regard to their business transactions with each other. The credibility of the witnesses, and the weight to be given their evidence, of course, were questions for the jury and the trial court.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Nov. 1, 1887; petition for a rehearing overruled Dec. 29, 1887.

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114 135
119 445
127 455
113 445
155 69
112 445
166 670

No. 12,966.

Castetter, Administrator, v. The State, ex rel. Bradburn.

Guardian and Ward.—*Death of Insolvent Guardian.—Settlement of Guardianship by Surety.—Jurisdiction.—Judgment.—Estoppel.*—Where the surety of a deceased and insolvent guardian, at the request of the ward, who has become of age, makes a final report and settlement of the guardianship matter, which is subsequently approved by the court having probate jurisdiction, and the surety by the judgment of the court is discharged from liability on the bond, it will be presumed, in the absence of a showing to the contrary, that the court acquired jurisdiction over the person of the ward, and the judgment so rendered, while it remains in force, is a bar to an action on the bond.

Castetter, Administrator, v. The State, *ex rel.* Bradburn.

DECEDENTS' ESTATES.—*Pleading Special Defences.—Demurrer.—Practice.*—Under section 11 of the act of March 7th, 1883 (Acts of 1883, p. 156), an administrator may prove any defence to a claim, except a set-off or counter-claim, without special plea; but where a special defence is pleaded, it may be tested by a demurrer, as in other cases, and error in ruling upon the demurrer is available as in other cases.

From the Hamilton Circuit Court.

W. S. Christian and *I. W. Christian*, for appellant.

R. R. Stephenson and *W. R. Fertig*, for appellee.

MITCHELL, C. J.—On the 30th day of January, 1873, Jacob M. Castetter was duly appointed guardian of the person and estate of the relatrix, Leona J. Bradburn. Michael J. Castetter became one of the sureties on the guardian's bond. The guardian died without having made a final settlement of his trust. Afterwards Michael J. Castetter, the surety, died, and the appellant, Peter W. Castetter, was duly appointed administrator of his estate. This proceeding was commenced on the 30th day of July, 1885, by the State, on the relation of Leona J. Bradburn, against the estate of the deceased surety, on the guardian's bond. The statement or complaint which was filed in the court below charged that the deceased guardian failed to account for the moneys which came into his hands, and that he had converted moneys belonging to his ward to his own use.

Without stopping to notice some objections to the complaint which we do not think well taken, we proceed to consider the second paragraph of the answer, to which the court sustained a demurrer.

This paragraph sets up that, in January, 1882, the appellant's decedent, as surety on the bond of the deceased guardian, whose estate was insolvent, with the knowledge and at the request of the relatrix, she being then over twenty-one years of age, made and filed in the Hamilton Circuit Court a final report and settlement of the proceedings in the guardianship matter, which report was subsequently, in the year 1885, approved and confirmed by the court, and that the

guardianship was then fully and finally settled, and that the appellant's decedent was thereupon discharged by the order and judgment of the Hamilton Circuit Court, which judgment so entered, it was averred, remained in full force.

Can a suit be maintained on the bond while the order and judgment of the Hamilton Circuit Court thus procured remain in force?

It is settled beyond controversy that the approval of a guardian's or administrator's final report and settlement is such an adjudication of all matters as were or should have been brought into the account and report as precludes all collateral inquiry into the correctness thereof, by parties interested therein, so long as the judgment of approval remains in force. *Carver* v. *Lewis*, 104 Ind. 438, and cases cited; *Wainwright* v. *Smith*, 106 Ind. 239; *Carver* v. *Lewis*, 105 Ind. 44; *Holland* v. *State, ex rel.*, 48 Ind. 391; *Parsons* v. *Milford*, 67 Ind. 489.

Such adjudications are conclusive, because the law requires that guardians and administrators make reports from time to time, and that they make final report and settlement when their respective trusts have been administered. Of the making of all such reports those interested must take notice, unless the statute makes provision that notice be given.

The statute, however, makes no provision for the filing of reports and securing releases from past liability by sureties on a guardian's bond, even though the guardian be dead, or has become insolvent. *Ferguson* v. *State, ex rel.*, 90 Ind. 38, 46.

A surety so situate may, however, as a matter of right, institute a proceeding, in some form, in the proper court, for the purpose of having the amount of his liability ascertained, and to be finally released from the bond, and from the liability already incurred, upon full payment. This might be by application or petition to the court in which the guardianship matter is pending. In such a case due notice must be given to those interested, or they must appear, as in

other cases, before the court can acquire jurisdiction over their persons so as to render a valid judgment.

Sureties on bonds given in the course of proceedings pending in court are so far under the protection and control of the court as that its jurisdiction may be invoked in their behalf while the proceedings are *in fieri;* they are in a sense parties to the proceeding. *Rout* v. *King*, 103 Ind 555.

Any statement of facts by the surety which would invoke the jurisdiction of the court over a subject-matter within its control, with notice to the parties interested, would confer such jurisdiction over the persons and subject-matter as would render an adjudication by the court conclusive against collateral attack while the judgment remained in force.

The answer under examination alleges that the appellant's decedent in his lifetime, to wit, in January 1882, made a final report to, and settlement with, the Hamilton Circuit Court of the guardianship matter of his deceased and insolvent principal, and that this was done at the request and with the consent of the relatrix, she having prior to that time attained her majority. This brought before the court and invoked its action upon a subject-matter over which it had general jurisdiction.

It appears from the answer that such proceedings were had in that behalf as that afterwards, in the year 1885, the report and settlement so made were fully approved and confirmed by the court, and that the appellant's decedent was, by the order and judgment of the court, discharged from liability on the bond. It does not appear from the plea whether or not notice was given to the relatrix, or whether or not she appeared in court.

It is alleged that the report and settlement were made at her request and with her consent. While a request or consent that the bondsman make a report and be discharged, if manifested out of court, could not confer jurisdiction over the person so as to authorize the court to render judgment, yet, since it appears that judgment was rendered by a court

of competent and general jurisdiction, we must presume, in favor of the regularity of its proceedings, that the court had, by notice duly served or by an appearance in court, acquired jurisdiction over the person of the relatrix. This is according to the rule that where a proceeding in a court of general or superior jurisdiction is of such a character that upon final action the court should, from the nature of the case, ascertain whether it is such in fact that it has jurisdiction to act, as it is invoked to do, and it does so act, its judgment can not be collaterally questioned, unless it affirmatively appears that the subject-matter was without its jurisdiction, or that it did not have jurisdiction over the persons affected by the judgment. *Horner* v. *Doe*, 1 Ind. 130 (48 Am. Dec. 355); *Dequindre* v. *Williams*, 31 Ind. 444.

The relatrix, being the ward whose guardianship was pending, must be deemed to have been a party to the proceeding and to the adjudication pleaded in the answer, and, in the absence of an affirmative showing to the contrary, it will be presumed that the court took all the requisite steps to acquire jurisdiction over her person before rendering its judgment. *Phillips* v. *Lewis*, 109 Ind. 62; *Sims* v. *Gay*, 109 Ind. 501, and cases cited; *Anderson* v. *Wilson*, 100 Ind. 402.

The second paragraph of answer, therefore, set up facts from which it appeared that the liability of the appellant's decedent had been once determined by a court of competent jurisdiction. Without setting that judgment aside, his estate can not be again vexed by a suit on the bond. It is said, however, that the facts pleaded might all have been proved under the general denial, which was also pleaded, and that hence it was a harmless error to sustain the demurrer.

Section 11 of the act approved March 7th, 1883 (Acts of 1883, p. 156), provides, in substance, that it shall not be necessary, when a claim against an estate is transferred for trial, for the executor or administrator to plead any matter by way of answer, except a set-off or counter-claim. This

section provides further, that if the executor or administrator plead any matter by way of defence, the claimant shall reply thereto. It provides further, that the sufficiency of the statement of the claim, or of any subsequent pleading, may be tested by demurrer. The effect of this section is to authorize an executor or administrator to prove any defence to the claim, except a set-off or counter-claim, without special plea. It contemplates, however, that an executor or administrator may plead any special defence, as in other cases, and that a defence so pleaded may be tested by demurrer as in other cases. It would be a mere play upon words to say that the sufficiency of a pleading might be tested by demurrer, if the overruling or sustaining a demurrer to a good answer was of no consequence in the end. The appellant having pleaded a special defence under the statute, which was sufficient, the error committed by the court in sustaining a demurrer thereto was not rendered harmless, because the defence might have been proved without special plea. Having pleaded specially, the case is not within those rulings which hold that where a demurrer is sustained to a good answer, setting up facts which may be as well proved under other answers which remain in, the error will be deemed harmless. When the court sustained a demurrer to the appellant's plea of former adjudication, he had a right to assume that evidence of such adjudication would not be admitted, or, if admitted, that it would not be considered by the court as an available defence.

There are other questions of minor importance raised by the record, and more or less referred to in the briefs, but in view of the conclusion already reached, it is not important that those questions be considered.

For the error in sustaining the demurrer to the second paragraph of the answer, the judgment is reversed, with costs.

Filed Dec. 2, 1887.

112	451
112	580
114	65
114	378
116	159
117	127
129	40
112	451
142	583

No. 13,281.

Dooley v. The Town of Sullivan.

Negligence. *Town.—Improvement of Sidewalk by Lot-Owner.—Excavation.*—To a complaint against a town to recover for an injury sustained by falling, in the night-time, into an excavation in a sidewalk, an answer that the excavation was made by the owner of the abutting lot in pursuance of an ordinance requiring him to improve the sidewalk, and that he had, when the work was left on the night in question, placed proper danger signals at the excavation, which the plaintiff, without any fault on the part of the lot-owner, had disregarded, is good.

Same.—*Danger Signals.—Keeping Watch.*—Only ordinary care is required of a municipal corporation, its agents and contractors, and it is sufficient to show that proper signals or guards were placed about an excavation on quitting work, unless there are circumstances peculiar to the particular case making it necessary that a watch be kept, and if such signals or guards are removed during the night by a wrong-doer there is no liability.

Same.—*Liability of Town for Acts of Property-Owner.*—The acts of a property-owner, who improves a sidewalk under an ordinance adopted in pursuance of section 3367, R. S. 1881, are not the acts of the town in such a sense as to charge the latter for his negligence; but, in order to charge the corporation, evidence of his negligence must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous.

From the Sullivan Circuit Court.

C. E. Barrett, W. C. Barrett, J. W. Shelton and *J. S. Bays*, for appellant.

J. T. Beasley and *A. B. Williams*, for appellee.

Elliott, J.—The complaint of the appellant alleges that the appellee caused the sidewalk on one of the public streets of the town to be torn up and an excavation to be made therein; that the excavation was left unguarded; that there were no barriers or signal lights placed about it, and that the plaintiff, without any negligence on his part, fell into the excavation on the night of the 22d day of September, 1885, and was greatly injured.

The second paragraph of the appellee's answer avers, in

substance, that Stephen A. White is the owner of a lot abutting on the street; that he was required by an ordinance passed by the board of trustees of the town to improve the sidewalk in front of his lot; that the only connection the town had with the improvement was to enact the ordinance and notify White to proceed under it to make the improvement; that he proceeded in accordance with the ordinance and notice; that he tore up the sidewalk and made the excavation into which the plaintiff fell; that, when the work was left on the night of September 22d, 1885, White placed near it a good and sufficient danger signal, and "used all the care and diligence he possibly could do in the prosecution of the work and in the placing of a danger mark, warning, and signal, at the excavation; and that the plaintiff, carelessly, recklessly and wholly disregarding said signal, and without any fault on the part of White," went into the excavation.

This answer is unquestionably good. It is good because it shows that the plaintiff was guilty of contributory negligence. It is good because it shows that White was not guilty of any negligence. In cases like this, only ordinary care is required of a municipal corporation, its agents and contractors, and ordinary care does not require that a watch be kept during the night over an excavation, unless there are circumstances peculiar to the particular case making it necessary. As a general rule, it is sufficient to show that proper signals or secure guards were placed about an excavation on quitting work, and neither the corporation nor its contractor is liable if a wrong-doer removes the signals during the night. *Doherty* v. *Waltham*, 4 Gray, 596; Shear. & Redf. Neg., section 360.

The difficult and controlling question arises on the ruling denying a new trial. The evidence shows that the work was done by the property-owner, White, under an ordinance passed by the board of trustees, and that the corporate authorities had no notice of the excavation. If White is to be

regarded as occupying the position of an independent contractor, then it is quite clear that to fasten a liability on the town it must be shown that the work was intrinsically dangerous, or that the town authorities had notice of the danger, or were negligent in not acquiring notice. *Ryan* v. *Curran*, 64 Ind. 345 (31 Am. R. 123); *Corporation of Bluffton* v. *Mathews*, 92 Ind. 213; *City of Evansville* v. *Wilter*, 86 Ind. 414; *City of Madison* v. *Baker*, 103 Ind. 41; 2 Dillon Munic. Corp. (3d ed.), sections 1025, 1029.

There is no evidence that the improvement was intrinsically dangerous, nor is there evidence that the corporate authorities had notice, or were negligent in not acquiring notice. The case can not, therefore, be maintained unless the act of the property-owner be deemed that of the town.

On the one side it is contended that the act was not that of the town, but of a person standing substantially in the position of an independent contractor, and that the town did no more than it had a lawful right to do in enacting the ordinance; while, on the other side, it is contended that the act of the property-owner was the act of the municipal corporation and that the corporation is liable for his negligence.

It is quite well settled that a municipal corporation is not liable for legislative or judicial acts. *City of Terre Haute* v. *Hudnut*, *post*, p. 542. It is only where the corporation performs ministerial acts that it can be held liable for negligence. There is, therefore, nothing in the act of the board of trustees in enacting the ordinance directing the making of the improvement upon which a cause of action can be based. If there is any liability at all it must be because of some negligence in the discharge of ministerial duties.

We think that the authority of a town extends to sidewalks, and that their liability is commensurate with their duty. It is beyond controversy that a sidewalk is part of a street, and, consequently, a statute referring to streets embraces sidewalks. *State* v. *Berdetta*, 78 Ind. 185 (38 Am. R.

117); *City of Kokomo* v. *Mahan*, 100 Ind. 242; 2 Dillon Munic. Corp., section 780, n. 1.

It is clear that the town has authority over sidewalks, and is under a duty to use ordinary care to keep them in a reasonably safe condition for use by those who exercise ordinary care. This appeal can not, therefore, be disposed of, as appellee's counsel affirm, upon the ground that the corporate duty does not extend to sidewalks.

If the acts of White are to be regarded as those of the town, then there may be a liability for his negligence without proof of notice, as it is the duty of the town to exercise ordinary care in performing work undertaken by it. But, in our judgment, the acts of a property-owner who improves a sidewalk under an ordinance of a town can not be deemed the acts of the town in such a sense as to charge the town with his negligence. In order to charge the corporation, evidence of the negligence of the property-owner must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous.

The statute expressly authorizes the board of trustees to compel abutting lot-owners to improve the sidewalks. It is, indeed, doubtful whether the board has power to cause the improvement to be made in any other method. The statute reads thus: "Whenever, in the opinion of the board of trustees of any incorporated town in this State, public convenience requires that the sidewalks of any street in such town should be graded or paved or planked, such board of trustees may, by an ordinance, compel the owners of lots adjoining such street to grade, pave or plank the same." R. S. 1881, section 3357.

This statute requires the corporate authorities, in cases where they proceed under it, to compel the property-owners to make the improvement, and does not invest them with authority to select the persons who shall do the work. Under this statute there is no authority vested in the municipal

authorities to choose agents or servants to do the ministerial work; that is left with the property-owner. Where there is no right of selecting or choosing, the relation of principal and agent can not exist; and where the relation of principal and agent does not exist, the maxim *respondeat superior* can not apply. It is, therefore, logically inconceivable that a municipal corporation, which is itself free from fault, should be held responsible for the negligence of a person not voluntarily chosen by it to perform an act. The authorities are harmonious upon this point, for all agree that, where the person, artificial or natural, is not vested with the authority of selecting, the maxim *respondeat superior* has no force. *Summers* v. *Board, etc.*, 103 Ind. 262 (53 Am. R. 512), and cases cited; *Bryant* v. *City of St. Paul*, 21 Cent. L. J. 33, and cases cited, note; 2 Dillon Munic. Corp. (3d ed.), sections 974, 1028.

Judgment affirmed.

Filed Dec. 2, 1887.

No. 13,382.

MAY, EXECUTOR, *v.* HOOVER ET AL.

STRUCK JURY.—*Peremptory Challenge.*—The parties to an action do not have the right of peremptory challenge in the case of a struck jury, demanded under section 525, R. S. 1881.

SAME.—*Estoppel.*—*Practice.*—One who has peremptorily challenged struck jurors after his adversary has been permitted, over objection, to do so, is not thereby estopped to complain of such ruling.

CONTRACT.—*Sale of Machine.—Warranty.—Right of Buyer to Reject.*—A contract for the sale of a machine which provides that if such machine fails, upon a fair trial, to do good work and give satisfaction the seller will

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112 455
134 41
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147 614
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148 647
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150 96
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take it back and the buyer shall pay nothing, does not give the latter the right to arbitrarily reject it, merely because he is not satisfied with it; but it must appear that it fails to give satisfaction on account of defects and a failure to do good work.

From the Bartholomew Circuit Court.

A. Burns. G. W. Cooper, F. T. Hord and *M. D. Emig,* for appellant.

J. C. Orr, W. F. Norton and *S. W. Smith,* for appellees.

ZOLLARS, J.—In 1882 appellees, who were partners, doing business under the firm name of Hoover & Co., commenced an action against Joseph D. Sidener. The action was based upon an account for the value of an "Excelsior Harvester and Binder."

The cause was tried and an appeal taken to this court. While the cause was pending here Sidener died, and appellant, as the executor of his will, was substituted as appellee. The judgment having been reversed (see *Hoover* v. *Sidener*, 98 Ind. 290), another trial was had below, in 1885. From the judgment rendered upon that trial appellant prosecutes this appeal.

Appellees have moved to dismiss the appeal for the reason that it was not taken within the time, nor in the manner, prescribed by sections 2454, 2456, 2457, R. S. 1881, and 2455, R. S. 1881, as amended in 1885 (Acts 1885, p. 194).

It is sufficient here to say that the question presented by their motion and argument has recently been before this court and decided adversely to their motion. *Heller* v. *Clark*, 103 Ind. 591; *Wright* v. *Manns*, 111 Ind. 422 (425).

Prior to the last trial below appellees demanded a struck jury, as provided by the statute. R. S. 1881, section 525. The parties attended at the clerk's office at the time fixed, and from the list of forty names selected by the clerk each struck off twelve. On the day set for the trial twelve of the remaining sixteen jurors, not struck from the clerk's list, appeared and were called, and took their places in the jury-box.

They were not challenged for cause. Over appellant's objections and exceptions, appellees were allowed to peremptorily challenge two of them, and they were discharged by the court, also over appellant's objection and exception, and the panel was filled from the by-standers.

The record thus presents the question as to whether or not parties may peremptorily challenge struck jurors. We have reached the conclusion that they have not that right.

Section 525, R. S. 1881, *supra*, after prescribing the method of selecting a struck jury, provides that "Upon the trial of the cause, the jury so struck shall be called as they stand upon the panel, and the first twelve of them who shall appear, and are not challenged for cause or set aside by the court, shall be the jury, and shall be sworn to try said issue: *Provided, however*, That, unless at least one-half of such struck jury shall have been summoned and shall be in attendance when such cause is called for trial, the case shall be tried by the regular petit jury, as other cases."

This section, it will be observed, recognizes the right of challenge for cause, and impliedly, at least, prohibits any other challenge. In the construction of the section the maxim "*Expressio unius est exclusio alterius*" (Broom Legal Maxims, 651,) should be applied. The mention of the challenge for cause excludes by implication peremptory challenges.

Section 531, R. S. 1881, provides that in all cases where the jury consists of six or more persons, each party shall have three peremptory challenges.

Appellees contend that this section and section 525, *supra*, should be construed together, as they are found in the same article of the present code, and that, when thus construed, it must be held that the latter section confers the right to peremptorily challenge struck jurors. The purpose of construction is to arrive at, and give effect to, the intention of the Legislature in the enactment of the laws. *Middleton* v. *Greeson*, 106 Ind. 18, and the cases there cited. In order to

ascertain that intention as to any statute, or section of a statute, all of its various sections and provisions should be construed together, so as to make the statute in all its parts consistent as a whole. *Wasson* v. *First Nat'l Bank, etc.*, 107 Ind. 206 (211). It is also proper, in cases of doubt, to look to the legislative history of a statute or section of a statute. *Stout* v. *Board, etc.*, 107 Ind. 343.

Section 531 of the present code is the same as section 313 of the code of 1852. 2 R. S. 1876, p. 161. At the time the code of 1852 was adopted, and for nine years thereafter, that section had relation to ordinary juries, and not to struck juries, because, until 1861, struck juries were unknown in our practice.

In 1861, Acts 1861, p. 45, 2 R. S. 1876, p. 159, an act authorizing struck juries was passed. That act of four sections was substantially the same as sections 525, 526, 527 and 528 of the present code, R. S. 1881. The act of 1861 was thus re-enacted into the code of 1881 as a part of it. It is reasonable to presume that, in thus re-enacting that act into the code of 1881, the Legislature did so upon the assumption that, as a part of that code, it should be construed, as it should have been while it stood alone, as a separate act. As a separate act, of subsequent date to the code of 1852, which provided for challenges of jurors, its proper construction, doubtless, should have been, had the question been raised, that it not only did not provide for peremptory challenges of struck jurors, but impliedly denied that right.

These observations have weight with us in reaching the conclusion that, construing the sections of the code of 1881 together, the Legislature did not intend that either party should have the right of peremptory challenge in the case of a struck jury.

Under a statute similar to section 531, *supra*, it has been held in Pennsylvania that struck jurors may be peremptorily challenged. The decisions, however, seem to have been rested upon a custom which was not very satisfactory to the

court. In the case of *Schwenk* v. *Umsted*, 6 S. & R. 351, the court, in speaking of the case before it, and the statute which provided "that in all civil suits each party shall be allowed to challenge two jurors peremptorily," used this language: "The several acts respecting jurors are to be considered collectively, as forming one general system, and explanatory of each other. The sense and spirit of this privilege is, that a party shall possess the power of challenging at least two persons who may be obnoxious to him, but against whom there is no legal exception as jurors. This is a proper indulgence even to prejudice; but the reason ceases when he has an opportunity of striking off twelve. If the practice had not prevailed to the contrary, I should much doubt this right in any case of special jury. Why should this indulgence and arbitrary discretion be extended to fourteen? Why should the suitor, after striking out at his pleasure one full jury, have the right, on the trial, to strike two jurors more without cause? He has, in the words of the *venire*, put himself on that jury so struck." The court in that case refused to extend the challenge to viewers. What was there said is applicable here.

In the case of *McDermott* v. *Hoffman*, 70 Pa. St. 31 (55), the court simply followed the above case, saying: "However it may have been, had the question been *res integra*, it must now be considered as set at rest, both by inveterate practice, and the early recognition of that practice by this court in *Schwenk* v. *Umsted*, 6 S. & R. 354."

On the contrary, under statutes similar to ours, including section 531, *supra*, the Supreme Courts of Ohio and Minnesota have held that, in case of struck jurors, neither party is entitled to a peremptory challenge.

In the case of *Branch* v. *Dawson*, 30 N. W. Rep. 545, the Supreme Court of Minnesota said: "The statute regarding struck juries does not contemplate or authorize peremptory challenges to any of the sixteen names constituting the struck list. The reason is that striking twelve names from the list

of forty selected by the sheriff is a substitute and equivalent for the right of peremptory challenge given in other cases." See *Cleveland, etc., R. R. Co.* v. *Stanley*, 7 Ohio St. 155; *State of Ohio* v. *Moore*, 28 Ohio St. 595.

After appellees had been allowed to peremptorily challenge the struck jurors, appellant also peremptorily challenged some of those remaining. Appellees now claim that, because he did that, he is estopped to complain of the action of the court in allowing the peremptory challenges by them. We do not think so. Had appellant been the first to make such challenge, the case would be different; but, after the court, over his objection, had allowed appellees to peremptorily challenge the struck jurors, and thus ruled that such challenges were proper, appellant had the right to meet his antagonists upon the ground chosen by them. And in doing so, he did nothing that ought to estop him from complaining of the error committed by the court in ruling as it did upon the solicitation of appellees.

For the error of the court in permitting appellees to peremptorily challenge the struck jurors, the judgment must be reversed.

There is one question that may be material upon a re-trial, and hence we decide it here. Appellant asked the court to charge the jury as follows: "If the machine was sold to Mr. Sidener, and at the time, and as a part of the terms of the sale, it was agreed by the agent of the plaintiffs that it should give satisfaction, then the meaning of this expression is that it should give satisfaction to Mr. Sidener himself; and if you find from the evidence that the machine was sold to Mr. Sidener with the agreement that it was to give satisfaction, and that Mr. Sidener, in good faith, after a fair trial, was not satisfied with it, and so notified the plaintiffs or their agents, and in a reasonable time thereafter offered to return the same, then he was not bound to keep it, or pay for it, and you must find for the defendant."

Other instructions of a like import were asked by appellant, and, with the above, were refused by the court.

It will be observed that by these instructions appellant sought a verdict upon the theory that Sidener might repudiate the sale upon the sole ground that he was not satisfied with the machine, although it may have been without defects. Doubtless, as was said in the case of *Flint* v. *Cook*, 102 Ind. 391, a contract may be so made as that the purchaser, out of mere caprice or whim, may refuse to receive, or, having received on trial, may refuse to retain, an article of personal property contracted for. The case in hand, however, we think does not involve that sort of contract. Appellant can not plead upon one theory and succeed upon another and entirely different theory.

The contract as set up in the answer is, that Sidener purchased the machine of appellees with the special warranty "that it would do good work and give general satisfaction," and with the express agreement that if, upon a fair trial of the machine, it should do good work and give general satisfaction, he should pay for it; and that if, upon such trial, it should not do good work and give general satisfaction, appellees were to take it back and Sidener should pay nothing. It is charged in the answer that, upon such trial, the machine failed to do good work and give satisfaction, in that the binder choked up, scattered and failed to bind one-half of the wheat cut by the reaper attached.

There are other averments in the answer, but, so far as the instructions under consideration are concerned, they need not be here noticed. We think it clear that the contract set up in the answer did not give Sidener the right to reject the machine, and refuse to pay for it, simply because he may not have been satisfied with it, regardless of the fact as to whether or not it did, or would do, good work. It was to do good work and give satisfaction. It was not to give satisfaction regardless of the sort of work it would do, but to give satisfaction by reason of doing good work. And, *e converso*, the

failure to give satisfaction was not to be regardless of the sort of work the machine would do, but by reason of it not doing good work. In other words, to give Sidener the right to return the machine, it was necessary that it should appear that it was defective, and would not do good work, and, for that reason, did not give satisfaction. This interpretation of the contract set up in the answer was, in effect, given to it upon the former appeal, although the statements in the opinion in relation to it are brief. See *Hoover* v. *Sidener, supra.* This interpretation is also fully sustained by the case of *Flint* v. *Cook, supra.* Appellant, therefore, was not entitled to instructions to the jury that if the machine did not give satisfaction to Sidener they should find for the defendant (appellant), regardless of the fact as to whether or not the machine was defective, or did, or did not, do good work. There was no error in the refusal of appellant's second instruction, and others of a like tenor.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to award a new trial.

Filed Dec. 2, 1887.

119 485
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112 462
159 498

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No. 12,908.

The State, ex rel. Walker, Prosecuting Attorney, v. Green.

Medicine and Surgery.—*Act Regulating.—Constitutionality.—License.—Qualifications of Applicants.—Special Privileges and Immunities.*—The act of April 11th, 1885 (Acts of 1885, p. 197), regulating the practice of medicine, surgery and obstetrics, requiring a license and prescribing the qualifications of persons entitled to receive the same, viz., (1) gradua-

tion from a reputable medical college, (2) a continuous residence and practice of medicine in this State for ten years prior to the taking effect of the act, or (3) a continuous residence and practice of medicine in this State for three years prior to the taking effect of said act and an attendance upon one full course of lectures at a reputable medical college, is not unconstitutional as granting special privileges and immunities to the citizens of this State, or otherwise.

SAME.—*License Procured by Fraud.—Proceeding by Prosecuting Attorney to Annul.—Quo Warranto.*—While the act of April 11th, *supra*, declares that a license procured by fraud shall be void, no provision is made for any judicial proceeding to have it so adjudged, nor can the prosecuting attorney bring an information in the nature of a *quo warranto* against the licensee to annul a license so obtained.

SAME.—*License not a Franchise.*—The right of a person to practice his profession, under a license issued pursuant to a statute enacted by the Legislature under the police power of the State, is not a franchise, it being essential to the character of a franchise that it should be a grant from the sovereign authority of the State.

SAME.—Section 1145, R. S. 1881, providing that an information may be prosecuted for the purpose of annulling any letters-patent, certificate or deed issued by the State authorities, when obtained by fraud, relates to real estate transactions, and is not applicable to licenses issued under the medicine and surgery act.

From the Benton Circuit Court.

L. T. Michener, Attorney General, *M. H. Walker*, Prosecuting Attorney, *E. P. Hammond* and *J. H. Gillett*, for appellant.

D. Fraser, for appellee.

HOWK, J.—This is an information in the name of the State, on the relation of Matthew H. Walker, Esq., prosecuting attorney of the 30th judicial circuit, against the appellee, Nellie E. Green, as defendant. Appellee's demurrer to the information was sustained by the court below, and to this ruling the State excepted, and, failing to amend or plead further, it was adjudged by the court that the State take nothing by its suit herein.

From this judgment the State has appealed to this court, and has here assigned as error the sustaining of appellee's demurrer to the information filed herein.

The State, *ex rel.* Walker, Prosecuting Attorney, *v.* Green.

In this information, it was alleged that, on the 15th day of August, 1885, defendant, Nellie E. Green, being desirous to obtain license from the clerk of the Benton Circuit Court to practice medicine, surgery and obstetrics in this State, filed with such clerk an affidavit stating therein that she had resided and practiced medicine, surgery and obstetrics in this State continuously for three years immediately preceding the date of the taking effect of an act of the General Assembly of this State, approved April 11th, 1885, at localities in this State, giving the date and length of time in each of such localities; and that, prior to the date of the taking effect of the aforesaid act, she had attended one full course of lectures at the College of Physicians and Surgeons in Keokuk, Iowa, the same being a reputable medical college. It was further alleged in such information, that, at the time the defendant filed such affidavit, she also filed with such clerk the affidavit of two other persons, to the effect that they were householders or freeholders of Benton county, and were acquainted with defendant, Nellie E. Green; and that they were informed and had reason to believe that she had practiced medicine, surgery and obstetrics, and had attended a course of lectures at a medical college substantially as she had stated such facts in her own affidavit filed with such clerk. These two affidavits are set out at length in the information, and it is then alleged therein that upon the filing of such affidavits, and on the same day, the clerk of the court below issued to the defendant, Nellie E. Green, a certificate showing that she had complied with the laws of this State relating to the practice of medicine, surgery and obstetrics, and thereby authorizing her to practice medicine, surgery and obstetrics in Benton county, setting out a copy of such certificate and license.

And the relator further averred, that the certificate and license issued as aforesaid by such clerk to the defendant, Nellie E. Green, were procured by her fraud, in this: That the matters and things set forth in the aforesaid affidavits

were wholly false, and were known to be false by the defendant at the time she filed such affidavits; that defendant had not, for three years immediately preceding the taking effect of said act, approved April 11th, 1885, continuously practiced medicine, surgery and obstetrics at the place or places stated in such affidavits, nor at any other place or places in this State, and that she never attended one full, or partial, course of lectures at the above named medical college, or at any other reputable medical college. Wherefore the relator prayed that the certificate and license, issued as aforesaid by such clerk to the defendant, Nellie E. Green, be annulled, vacated, set aside and declared void, and that such defendant be perpetually enjoined from practicing medicine, surgery or obstetrics, under or by virtue of such certificate and license, and for other proper relief.

In her demurrer, defendant, Nellie E. Green, assigned the following grounds of objection to the information, namely:

1. The information does not state facts sufficient to constitute a cause of action.

2. The Benton Circuit Court had no jurisdiction of the subject-matter of this action.

3. The Benton Circuit Court had no jurisdiction of the person of defendant.

4. The State had no capacity to sue in this action.

5. The State's relator had no capacity to sue in this action.

The act referred to in the information herein is entitled "An act regulating the practice of medicine, surgery and obstetrics, providing for the issuing of licenses to practice, defining certain misdemeanors, and providing penalties," approved April 11th, 1885. Acts of 1885, p. 197 *et seq.* Section 1 of this act declares that it shall be unlawful for any person to practice medicine, surgery or obstetrics in this State, without first obtaining a license so to do, as provided in such act. Section 2 of such act, so far as applicable to the case at bar, provides as follows: "Any person desiring to practice medi-

cine, surgery or obstetrics in this State, shall procure from the clerk of the circuit court of the county wherein he or she desires to practice a license so to do, which license shall be issued to such person only when he or she * * * shall file with such clerk his or her affidavit, and the affidavit of two reputable freeholders or householders of the county, stating that he or she has resided and practiced medicine, surgery and obstetrics in this State continuously for three years immediately preceding the date of the taking effect of this act, stating particularly the locality or localities in which he or she practiced during said period, and the date and length of time in each locality, and that he or she had, prior to said date, attended one full course of lectures in some reputable medical college." Section 3 of such act provides that any clerk who shall issue such a license to any person who had not complied with the requirements of section 2 of the act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined, etc., and then declares that "such license, or one procured by any false affidavit, shall be deemed and held to be void." Section 4 of the act makes it a misdemeanor, punishable by fine, etc., for any person to practice medicine, surgery or obstetrics in this State without having first procured from the clerk of the circuit court of the county wherein he or she shall so practice a license as provided in such act: "*Provided*, That this act shall not be deemed to prohibit women from practicing obstetrics, and such midwives are hereby expressly exempted from its provisions." Section 5 of such act provides that no cause of action shall lie in favor of any person for his services as physician, surgeon or obstetrician who had not, prior to the rendition of such services, procured a license to practice as provided in such act, and any person who had paid money, or delivered property, for any such services, to any person not so licensed, may recover the same or the value thereof in any court of competent jurisdiction. The 7th and last section

of such act simply prescribes the form of the license to be issued by the proper clerk.

In this court appellee's learned counsel has vigorously assailed in argument the sufficiency of the relator's information herein, upon two grounds, as follows:

1. Because the above entitled act of April 11th, 1885, is unconstitutional, in that "it creates privileges and makes discriminations unwarranted by the Constitution."

2. The case stated in the information is not one in which, under the law of this State, an information in the nature of a *quo warranto* will lie, or which the prosecuting attorney is authorized to bring and maintain in the name of the State of Indiana upon his own relation.

These two grounds we will consider and pass upon in the order of their statement, merely premising that if either one of them is found to be well taken the information must be held to be insufficient and the judgment below must be affirmed.

1. Is the above entitled act of April 11th, 1885, unconstitutional? Is such act in conflict with or repugnant to any provision of our organic or fundamental laws, State or Federal? In considering this question it must be borne in mind, of course, that the power and authority of the General Assembly of this State, in the enactment of laws, is supreme and sovereign, and is free from any limitations or restrictions thereon, except such as are imposed by the State Constitution or the Federal Constitution, and the laws and treaties thereunder.

In the recent case of *Eastman* v. *State*, 109 Ind. 278, in considering the question of the constitutionality of the aforesaid act, it was held by this court that the Legislature has power to regulate the practice of medicine and surgery by requiring a license therefor, and to prescribe the qualifications of applicants for such license, and that such act was a constitutional and valid law. The case cited was approved and followed in the later case of *Orr* v. *Meek*, 111 Ind. 40.

It is not claimed by appellee's counsel, as we understand his argument, that the General Assembly of this State may not, as a proper exercise of the police power of the State, regulate and license the practice of medicine and surgery, and prescribe the qualifications of applicants for license, by the enactment of a constitutional and valid statute. Counsel says: "I do not wish to be understood as attacking the validity of the entire act; if there are provisions that will withstand the constitutional test of equal rights, equal privileges, and equal concessions, they do not come within the purview of this discussion."

The statute provides for the issue of license to practice medicine, etc., to three classes of applicants, and the proof of qualification to be produced by each class, as follows:

1. The affidavit of the applicant, stating that he or she has regularly graduated in some reputable medical college, and the exhibition to the proper clerk of his or her diploma.

2. The affidavits of the applicant and of two reputable freeholders or householders of the county, stating that such applicant had resided and practiced medicine, etc., in this State continuously for ten years immediately prior to the taking effect of such act.

3. The affidavits of the applicant and of two reputable freeholders or householders of the county, stating that he or she had resided and practiced medicine, etc., in this State, continuously for three years immediately prior to the taking effect of such act, and that he or she had, prior to that date, attended one full course of lectures in some reputable medical college. Acts of 1885, pp. 197, 198, section 2.

It is claimed by appellee's counsel, that these provisions of the statute, in so far as they make continuous residence in this State, either for ten years or for three years, one of the necessary qualifications of the applicant for license to practice medicine, etc., are in conflict with, and repugnant to, section 2 of article 4, and to section 1 of article 14 of the Federal Constitution. In section 2 of article 4 of the Federal

Constitution it is declared that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" and in section 1 of article 14 of the same Constitution it is declared that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Sections 19 and 39, R. S. 1881.

In discussing this constitutional question appellee's counsel assume that the effect of the statute under consideration is to grant the practitioner of medicine, etc., who had resided and practiced his profession in this State for specified periods of time, "privileges and immunities" which are not given the practitioner who has practiced his profession for the same periods of time, but has resided in another State. Counsel says: "Ten years practice of medicine and surgery, and ten years residence in this State, give to a citizen of Indiana a license; in other words, to follow this profession for ten years is sufficient for a citizen of Indiana. Is ten years practice by a citizen of Illinois sufficient for him? Does ten years practice answer the same purpose for each citizen? The statute gives to one a license because he has practiced for ten years, and refuses it to the other, and why? Because the one is a citizen of the State and the other is not. Can the State make this discrimination between her own citizen and the stranger who comes within her borders from a neighbor State? Not so. The Federal Constitution puts it beyond the power of hostile legislation to render wholly false the great principle that all men are alike equal, and all citizens of the United States alike entitled to the same chances in life."

The fundamental error in this argument of counsel is this, that it rests and proceeds upon the erroneous and unwarranted assumption that the above entitled act grants "privileges and immunities" to the citizens of this State which are not allowed by the act to the citizens of other States. The act does not grant privileges or immunities to any citizen, or

class of citizens, whether within or without this State. In the exercise of the police power of the State, for the purpose of protecting its inhabitants from the ignorance or effrontery of the charlatans, empirics or mere quacks who professed and pretended to be well skilled and qualified in the noble sciences of medicine and surgery, the General Assembly of the State, by the statute we are now considering, as we have seen, enacted that it should be unlawful for any person (without any reference to residence) to practice medicine, surgery or obstetrics in this State without having first obtained a license so to do, as provided in such act.

It is not contended by appellee's counsel, nor, indeed, can it be successfully maintained, that the General Assembly may not, under the police power of the State, so far regulate the practice of medicine, surgery or obstetrics in this State as to require that any person desiring to engage in such practice shall first procure a license so to do. That far forth the constitutionality of the act under consideration has already been upheld and fully sustained by this court in *Eastman* v. *State*, *supra*, and *Orr* v. *Meek*, *supra*.

In requiring such license, and prescribing the qualifications of the applicant therefor and the necessary proof thereof, the statute first provided, as we have seen, that license should be issued to any applicant who showed by his or her affidavit that he or she had graduated in some reputable medical college, and who exhibited to the proper clerk his or her diploma, without any reference to his or her residence. This provision of the statute is not assailed by appellee's counsel, and, certainly, it is not repugnant to either the State or Federal Constitution. It will be observed, that the statute nowhere denies to any person, of any age, sex, race, color or residence, the right or privilege, if such it be, to obtain a license to practice medicine, surgery or obstetrics in this State if such person can show, in the mode prescribed by the statute, that he or she is possessed of the requisite statutory qualifications to entitle him or her to such license.

In *Ex Parte Spinney*, 10 Nev. 323, the precise question we are now considering was before the Supreme Court of the State of Nevada, upon a statute containing provisions very similar to those of the statute of this State. HAWLEY, C. J., there said: "The real test of qualification in the act under consideration, is based upon medical skill and knowledge. The physician or surgeon entitled to practice must have received a medical education and must have obtained a diploma from some regularly chartered medical school. Now the Legislature saw fit, in establishing this test, to except from its provisions a certain class of physicians and surgeons; in so doing it in effect declared—to state the extreme case—that the physician or surgeon who had practiced his profession in this State for the period of ten years immediately preceding the passage of this act, was as well qualified, in its judgment, to continue the practice of his profession as the student, coming fresh from the halls of college with his diploma, was to commence it. In adopting this exception the Legislature did not infringe upon any provision of our State or Federal Constitution." See, also, *State* v. *Dent*, 25 W. Va. 1, and *Fox* v. *Territory*, 5 W. Coast Rep. 339, in each of which cases, statutes regulating the practice of medicine, etc., containing provisions similar to those of the statute of this State, were sustained and held to be constitutional and valid laws.

In the case in hand, we are of opinion that the provisions of the above entitled act assailed here in the oral and written arguments of appellee's counsel are not in conflict with our fundamental laws, State or Federal, but are constitutional and valid.

2. Does the information herein state a case wherein, under our law, such an information will lie, or which the prosecuting attorney may bring and maintain in the name of the State upon his own relation? This question must, we think, be answered in the negative. It is true that the facts stated in the information, and admitted to be true by appellee's de-

murrer, show very clearly that she obtained her license to practice medicine, etc., in Benton county upon false affidavits. In such case the statute provides, as we have seen, that the license so procured "shall be deemed and held to be void." It is conceded by appellant's learned counsel, and correctly so, that notwithstanding this legislative declaration that the license so procured shall be deemed and held to be void, yet such license would not be void until it was judicially declared so to be in a proper proceeding for that purpose, and would protect appellee from prosecution for practicing her profession, and enable her to recover compensation for her services in the course of her practice. It is true, also, that the above entitled act does not provide for any suit or judicial proceeding, in which the license, procured by any false affidavit, might be adjudged and held to be void.

But it does not follow, by any means, that, because of the omission in the statute to provide for such a suit or proceeding, resort may be had to an information, in the nature of a *quo warranto*, to obtain an adjudication that appellee's license, procured by false affidavits as it was, should be deemed and held to be void. Appellant's counsel claim that the right acquired under a license issued pursuant to the above entitled act is a franchise. If this claim of counsel could be maintained, then it would follow that relator's suit was well brought, under the provisions of section 1131, R. S. 1881, and that it was error to sustain the demurrer to the information. But counsel clearly err, we think, in claiming that the right acquired by the licensee, under such a license, is, in the proper or legal sense of the word, a franchise. A franchise is a privilege or immunity which can only exist by special grant of the government of the State, and is incapable of existing without such grant, and which the citizen can not enjoy without legislative grant. It is essential to the character of a franchise, in the legal sense of the word, that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from

the legislative power of the State. It can not be held, we think, that the right of any person to practice his or her profession, under a license issued pursuant to a statute enacted by the Legislature under the police power of the State, comes within any legal definition of a franchise. *Chicago, etc., R. W. Co.* v. *People*, 73 Ill. 541; *Bank of Augusta* v. *Earle*, 13 Peters, 519; *City of Bridgeport* v. *New York, etc., R. R. Co.*, 36 Conn. 255 (4 Am. R. 63).

But it is further claimed by appellant's counsel that section 1145, R. S. 1881, is applicable to this case, and that, under the provisions of that section, an information in the nature of a *quo warranto* will lie to annul and vacate appellee's certificate or license.

That section provides that an information may be prosecuted for the purpose of annulling or vacating any letters-patent, certificate or deed issued by the State authorities, when there was reason to believe that the same were obtained by fraud, etc. Manifestly, these provisions of the statute are only applicable to such certificates as were issued in relation to real estate, and can not be applied to such a certificate as the one issued to and held by appellee.

The demurrer to the information herein was correctly sustained.

The judgment is affirmed.

Filed Dec. 2, 1887.

112	474
114	535
114	580
116	314
122	357
112	474
145	270
112	474
148	504
152	51
112	474
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112	474
166	628

No. 12,675.

THE MUNCIE NATIONAL BANK ET AL. *v.* BROWN.

CHATTEL MORTGAGE.—*Certificate of Acknowledgment.—Notary Public.—Use of Another's Seal.—Recording of Instrument.*—The fact that a notary public, in a certificate of acknowledgment to a mortgage, uses a plain notarial seal not his own, and differing somewhat in design from the one ordinarily used by him, does not affect the validity of the instrument nor render its recording illegal.

SAME.—*Breach of Official Duty.—Facts Constituting Must be Pleaded.*—In such case, in order to entitle a party assailing the mortgage to avail himself of any breach of duty on the part of the officer in certifying the acknowledgment, it is necessary that the facts constituting the breach shall be affirmatively pleaded.

SAME.—*Instrument Perfect in Form.—Unverified Denial.*—Where the complaint to foreclose the mortgage avers that it was acknowledged and recorded, an unverified general denial only requires the plaintiff to produce an instrument showing on its face due execution, acknowledgment and registry.

SAME.—*Description.*—For a description of mortgaged personal property which is held to be sufficiently specific, see opinion.

SAME.—*Possession by Mortgagor.—Authority to Sell.—Fraud.*—Under the statutes of this State fraud is a question of fact, and can not be decided upon the face of a mortgage authorizing the mortgagor to retain possession and sell the mortgaged property.

SAME.—*Taking Personal Judgment.—Subsequent Foreclosure.*—A party who sues on a note and mortgage is not precluded from subsequently obtaining a decree of foreclosure by taking a personal judgment for the amount due, as such judgment does not merge or impair the mortgage security, and the lien continues until foreclosed.

SAME.—*Estoppel.*—One who accepts a chattel mortgage, in which it is stipulated that it is second and subsequent to another mortgage executed upon the same property, is estopped to assert that the prior mortgage was made with intent to defraud creditors.

PRACTICE.—*Striking Out Evidence.*—A party can not complain of the striking out of evidence, the admission of which was not authorized by his pleadings.

From the Delaware Circuit Court.

A. C. Harris, W. H. Calkins, R. S. Gregory and *A. C. Silverberg*, for appellants.

C. E. Shipley and *J. W. Ryan*, for appellee.

The Muncie National Bank *et al.* v. Brown.

ELLIOTT, J.—Cornelia A. Brown brought this suit to foreclose a mortgage on real and personal property executed to her on the 31st day of January, 1885, by her husband, Francis M. Brown. The promissory notes which the mortgage was executed to secure bear date January 13th, 1879, November 22d, 1879, January 22d, 1882, August 29th, 1883, and September 13th, 1884. The personal property is thus described in the mortgage: "The dry goods, carpets, hats, caps, clothing, notions, gentlemen and ladies' furnishing goods, queensware, groceries, and all other goods, wares and merchandise constituting the stock in trade heretofore owned by Francis M. Brown, and contained in the store-room and cellar belonging to and part of the west room on the street grade floor known as the Boyce block, on the north side of East Main street, in the city of Muncie, in said county and State; and, also, all of the wool, rags, feathers, and other country produce, and all of the show and display cases, and store furniture and fixtures, and gas fixtures, and all other property of whatever kind in the said store-room situate as aforesaid, and all of the promissory notes and book accounts now owned by the said mortgagor, for indebtedness growing out of the mortgagor's mercantile business." It is recited in the mortgage, among other things, that "It is hereby stipulated expressly as the true intent of this mortgage to prefer the said claim of the said Cornelia A. Brown, as herein described, over and above all other of the said Francis M. Brown's indebtedness." There is also in the mortgage this agreement: "It is agreed and understood by and between the parties to this mortgage that the said Francis M. Brown shall retain possession of all of said merchandise and personal property hereby mortgaged, and may continue selling and disposing of the said mortgaged merchandise for cash as heretofore, until all of said debts shall become due, or until such preference mortgagee, Cornelia A. Brown, shall demand possession thereof, which she may at any time hereafter do; but that said Francis M. Brown shall, at the end of each

and every calendar month hereafter, fully and honestly account for all of the proceeds of such sales, and, after deducting therefrom necessary expenses of conducting such business, shall pay over the remainder to the mortgagee."

Subsequent to the execution of the mortgage to the appellee, Francis M. Brown executed a mortgage to the Muncie National Bank, which it accepted with actual knowledge of the prior mortgage. The bank brought suit to foreclose its mortgage on the 2d day of February, 1885, and asked for the appointment of a receiver. In accordance with the prayer of the complaint, Marcus S. Claypool was appointed a receiver, and as such took possession of the store and goods. Cornelia A. Brown brought this suit after the bank had filed its complaint and secured a receiver. The mortgagor made default and damages were assessed against him. After this had been done the bank filed a cross-complaint, and in conjunction with the receiver filed a motion to set aside the default against Brown. At the same time the other appellants were admitted to defend and were allowed to assail the appellee's mortgage. The trial court sustained the motion to set aside the default as to Francis M. Brown and entered an order setting it aside.

The first proposition argued by appellant's counsel is thus stated: "The mortgage was not entitled to be put of record, and, therefore, was never recorded."

The argument of which this proposition is the foundation rests on the testimony of the notary public by whom the acknowledgment of Francis M. Brown was taken. From that testimony it appears that the notary borrowed a seal in 1871 and used it in authenticating his official certificates, but did not use it in this particular instance. The seal which he attached to the certificate annexed to the appellee's mortgage was obtained at the office where the mortgage was written. The designs of the seals are somewhat unlike, and the words differently arranged. The words of one are "Notary Pub-

lic. Seal. Indiana;" and those of the other are "Notary Public. Delaware Co., Ind."

It can not be assumed that there was no seal, since there was a seal actually impressed upon the paper. On the face of the instrument the certificate was perfect in form and in authentication. We can not, therefore, hold that there was no acknowledgment.

The utmost that can be asserted is, that the notary public did not do his duty as the law requires, by attaching the seal he was accustomed to use. He did, in fact, take the acknowledgment of the mortgagor; he did execute and sign the proper certificate, and he did affix a seal to the certificate. If the acknowledgment must be condemned, it is because the officer did wrong in using a seal not his own. No one can perceive how this breach of duty could have worked injury to any person in the world. Whether the one seal or the other was used did not add to or take from the certificate any real efficacy. If the notary two hours before the acknowledgment had thrown away his old seal and adopted another, certainly no real harm to any person could have been done. Nor is it easy to see how the mere use of one seal instead of another, where both are mere general seals, without any peculiar marks or names, could do anybody any harm. Courts ought not, as it seems to us, to strike down a mortgage for such a breach of duty unless the law imperatively requires it. We can not believe that the law requires such a result in a case where, as here, a notarial seal is used, although not the one the notary kept for use.

We have examined the cases of *Mason* v. *Brock*, 12 Ill. 273, *Buell* v. *Irwin*, 24 Mich. 145, *McKellar* v. *Peck*, 39 Texas, 381, *Hinckley* v. *O'Farrel*, 4 Blackf. 185, *Dumont* v. *McCracken*, 6 Blackf. 355, *Maxey* v. *Wise*, 25 Ind. 1, *Pope* v. *Cutler*, 34 Mich. 151, and *Wetmore* v. *Laird*, 5 Biss. 160, and our conclusion is that they are not of controlling force, for in none of those cases was the question presented as it is in the case before us. Here a notarial seal was actually

used, and the mistake of the officer consisted simply in using one not his own.

The case that most nearly approaches the present is that of *McKellar* v. *Peck*, *supra*, where the seal of the clerk was used; but, conceding that the decision there made was correct, which we doubt, it is obvious that it is not fully in point here. If there had been no seal at all, or if the seal had not been an appropriate notarial seal, a very different question would confront us. Even in such a case, however, it is doubtful whether the error was a fatal one, since there are very respectable authorities justifying the conclusion that the mistake was one that might be cured by amendment. *Jordan* v. *Corey*, 2 Ind. 385; *Hunter* v. *Burnsville T. P. Co.*, 56 Ind. 213; *Arnold* v. *Nye*, 23 Mich. 286; *Sonfield* v. *Thompson*, 42 Ark. 46.

If, however, we are wrong in our conclusion upon this point it would not change the result, for it would not lead to a reversal. There was no pleading attacking the certificate of the notary public, and, therefore, no issue under which a defence founded on the use of another's seal in attesting the certificate was available. There is a seal attached to the certificate, it is the seal of a notary public, and it has no peculiar marks indicating that it was not the seal of the officer by whom it was used. It is a general seal, and such as our law recognizes as valid. *Lange* v. *State*, 95 Ind. 114. The presumption is that the officer did his duty, and this presumption is aided by the indications apparent on the face of the instrument. In order to entitle the parties assailing the mortgage to avail themselves of any breach of duty on the part of the officer, it was necessary for them to affirmatively plead the facts constituting the breach.

It is true that the complaint avers that the mortgage was acknowledged and recorded, and that this averment is met by the general denial, but we do not think that this denial did more than to require the plaintiff to produce an instrument showing on its face due execution, acknowledgment and reg-

istry. The presumption in favor of the official acts of the notary, aided, as it was, by the indications on the face of the instrument, made a *prima facie* case. This *prima facie* case stands until overthrown. *Bates* v. *Pricket*, 5 Ind. 22.

It can not be overthrown, in any event, without some pleading attacking the conduct of the officer, since all that the general denial required of the plaintiff was the production of an instrument perfect on its face and bearing the seal and signature of an officer, apparently regular and in due form. We have many analogous cases in which it is held that an unverified general denial does no more than impose upon the plaintiff the duty of producing an instrument perfect in form. These cases certainly apply where, as here, there is neither imperfection nor irregularity apparent on the face of the instrument, but where, in order to establish an irregularity, it is necessary to investigate the official acts of a public officer. The case, therefore, is much stronger than one in which the mistake or irregularity grows out of the acts of a party. It seems quite clear to our minds that such a field of investigation ought not to be opened without an affirmative pleading challenging the conduct of the officer whose acts are assailed. Any other rule would defeat the purpose of our code, which, as is well known, is to require such pleadings as will fairly inform a party what he is expected to meet.

Counsel thus state their second proposition: "The decree for the sale of the property is void."

The argument made in support of this proposition is, that the property was in the hands of a receiver, appointed by the court in the suit brought by the bank. Whatever of force there might be if the point had first been appropriately made in the trial court, there is none in it as made in this court. It seems, indeed, that, under our decisions, the point would not have been well taken in the trial court. So far as the complaint demanded a personal judgment against the mortgagor and a declaration of the lien of the mortgage, it was

undeniably good. *Ohio, etc., R. W. Co.*, v. *Nickless*, 71 Ind. 271; *Fort Wayne, etc., R. R. Co.* v. *Mellett*, 92 Ind. 535; *Gilbert* v. *McCorkle*, 110 Ind. 215.

But, however this may be, we regard it as clear that the complaint can not be successfully attacked by the assignment of errors on the ground that the property was in the possession of a receiver. The mortgagee undoubtedly had a right to a judgment and to have her lien established, and to that extent, at least, if not to a much greater, her complaint was good. If good only to the extent stated, it would repel even a demurrer. *Bayless* v. *Glenn*, 72 Ind. 5. It certainly will, therefore, repel an attack made for the first time after the finding.

The third proposition of counsel is this: "The mortgage is void for uncertainty; also, because it provides for continued possession."

Although the proposition is in form single, in substance it is double. The first proposition refers to the description of the mortgaged property. The question involved has often been before this court, and descriptions much less specific have been held sufficient. *Duke* v. *Strickland*, 43 Ind. 494; *Ebberle* v. *Mayer*, 51 Ind. 235; *Burns* v. *Harris*, 66 Ind. 536; *Zehner* v. *Aultman*, 74 Ind. 24. These decisions are well sustained. The authorities are collected in an article in 24 Central L. J. 339, where many cases very like the present will be found.

The second proposition involved in the general statement is based upon cases which hold that, where a mortgage clothes the mortgagor with authority to retain possession of the property and sell it in the ordinary course of business, it is fraudulent and void as to creditors. It is quite doubtful whether the mortgage of the appellee falls within those cases, since it provides that sales shall be made for the benefit of the mortgagee; but we need not discuss this question, for, under our statute, fraud is a question of fact, and can not be decided upon the face of a mortgage authorizing the mortgagor to

sell the mortgaged property. We can not hold that a provision in a chattel mortgage vesting the right of disposition in the mortgagor vitiates the mortgage, for our statute and our decisions declare a very different rule. *McLaughlin* v. *Ward*, 77 Ind. 383; *Morris* v. *Stern*, 80 Ind. 227; *McFadden* v. *Hopkins*, 81 Ind. 459; *Louthain* v. *Miller*, 85 Ind. 161; *Berghoff* v. *McDonald*, 87 Ind. 549; *McFadden* v. *Fritz*, 90 Ind. 590; *Dessar* v. *Field*, 99 Ind. 548; *Stix* v. *Sadler*, 109 Ind. 254.

The fourth proposition of counsel is thus expressed: "Taking personal judgment for $15,490 merged the suit into that judgment."

We can not assent to this doctrine. We know of no principle upon which it can be held that a party who sues on a note and mortgage is precluded from obtaining a decree of foreclosure by taking a judgment for the amount due, in a case where the decree for the foreclosure is prevented by the interposition of intervening creditors.

We concede, as broadly as can be claimed, the rule that a party can not split his demands, but must recover in one action. *Crosby* v. *Jeroloman*, 37 Ind. 264; *City of Terre Haute* v. *Hudnut*, *post*, p. 542, and cases cited. But there was here no splitting of demands. There was one suit, and all the damages were assessed, so that the rule can have no application. We suppose it to be well settled that a personal judgment may be taken on a promissory note secured by a mortgage, in an independent action, and that a foreclosure of the mortgage may be secured in a subsequent suit. We can not conceive why a plaintiff may not enter a personal judgment on one day of the term, and on a subsequent day enter a decree of foreclosure, even in a case where the decree is not postponed by the action of intervening creditors. The judgment merges the cause of action so that no second judgment can be obtained, but it does not merge the mortgage security. The authorities go so far as to hold that the decree of fore-

closure does not merge the lien of the mortgage, although it merges the mortgage as a cause of action. *Teal* v. *Hinchman*, 69 Ind. 379; *Evansville, etc., Co.* v. *State, ex rel.*, 73 Ind. 219 (38 Am. R. 129); *Manns* v. *Brookville Nat'l Bank*, 73 Ind. 243 (246); *Pence* v. *Armstrong*, 95 Ind. 191 (207); *Curtis* v. *Gooding*, 99 Ind. 45 (51).

But here there was no decree of foreclosure, so that there was not even a merger of the mortgage as a cause of action, and surely the lien continued until foreclosed. If the lien continued until foreclosed, then it is not possible that it could have been merged by a simple personal judgment. A personal judgment can not drown the mortgage security; nothing but a decree of foreclosure can do so much, and until this drowning takes place there can be no merger. A personal judgment does not extinguish the mortgage lien, and until extinguished it is enforceable by a decree.

Counsel lose sight of the fact that in every case like this there are two distinct things—a debt, and the mortgage securing it. A personal judgment does not extinguish the debt, although it merges it as a cause of action. But while there is a merger of the debt in the personal judgment, the lien of the mortgage remains unaffected. The mortgage will sustain a suit for a decree of foreclosure although there may be a personal judgment. Until there is a foreclosure there is no judgment merging, or even impairing, the mortgage security.

The trial court sustained the motion of the appellee to strike out all evidence tending to prove that the mortgage executed to the appellee was fraudulent.

The Muncie National Bank is not in a situation to complain of this ruling, for in the mortgage which it accepted that executed to the appellee is recognized as valid. It is recited in the former mortgage that "It is expressly stipulated herein that this mortgage is made second and subsequent to that of one executed to Cornelia A. Brown and John C. Jenners to secure the payment of certain of the in-

debtedness of the said Francis M. Brown to them and each of them as described in said mortgage." Having treated the mortgage as a valid one, the bank can not be allowed to assail it on the ground that it was made with the intent to defraud creditors. *Barr* v. *Hatch*, 3 Ohio, 527; *Irwin* v. *Longworth*, 20 Ohio St. 581; Bump Fraud. Conv. 465.

The cross-complaint is good as against Francis M. Brown. It is not good as against the appellee so far as it attempts to charge her with fraud, but it is good in so far as it shows that she claimed an interest in the property in controversy. A demurrer to it was, therefore, properly overruled. But, in overruling this demurrer, the trial court did not decide that it would receive evidence tending to prove that the mortgage was executed to defraud creditors. A court in passing upon a demurrer does not decide in advance what evidence will or will not be received. Nor is a court bound to adhere to its decision, for it is well settled that it may reconsider a ruling on demurrer and rectify an error. It can not, therefore, be justly assumed that the court misled the appellants.

A party who files a bad pleading, and not the court, is in fault. The appellants were in fault in not making their cross-complaint sufficient for all that they desired it to accomplish, and we can not conceive how the trial court can with justice be censured for not giving them more than their pleading entitled them to demand. As there was no pleading entitling the appellants to introduce the evidence struck out, we can not condemn the ruling of the trial court.

Judgment affirmed.

Filed Dec. 3, 1887.

112 484
114 193
115 463
112 484
135 169

No. 12,583.

MOORE v. SARGENT.

MORTGAGE.—*Series of Notes.—Default in Payment.—Stipulation that Whole Debt Becomes Due.—Waiver.*—Where a mortgage given to secure notes maturing at different times provides that upon the failure of the mortgagor to pay the first note at maturity the others shall become due, no election on the part of the creditor being stipulated for, the latter, by merely accepting the amount of the first note after default, does not thereby waive his right to treat the whole debt as due.

PLEADING.—*Abatement.—Premature Bringing of Action.—Practice.*—Matter tending to show that an action has been prematurely brought is only available by plea in abatement, and if pleaded with defences in bar without verification may be stricken out or held bad on demurrer.

PRACTICE.—*Calling Case for Trial.*—Calling a case for trial is an announcement or declaration by the court that it has been reached in its order, and that a judicial examination of the issues upon which the decision of the case depends is about to begin.

CHANGE OF VENUE.—*Rule of Court.*—Where a rule of the trial court requires applications for changes of venue to be presented before the case is "called for trial," and on appeal the record shows that an affidavit for a change of judge was filed the day before the day set for trial, and nothing more, the denial of the application is erroneous.

From the Allen Superior Court.

R. S. Robertson, for appellant.

W. G. Colerick, for appellee.

MITCHELL, C. J.—Louisa A. Moore executed a mortgage on certain real estate to secure two notes payable to William Sargent, Jr., one for $600, payable on June 1st, 1884, the other for $800, due in three years from date. The notes and mortgage bore date the 21st of April, 1884, and were given to secure deferred payments of purchase-money. The mortgage contained a stipulation, therein written, to the effect, that if the mortgagor failed to pay either of the notes, or any part thereof, at maturity, the entire debt should at once become due and collectible. In a complaint filed May 11th, 1885, to foreclose the mortgage, it was alleged that the first

note, which fell due June 1st, 1884, had been paid, but that payment thereof had not been made until the 4th day of June, 1884, three days after its maturity, and that, in consequence of the failure to pay at maturity, the second note had fallen due pursuant to the stipulation written in the mortgage.

It is contended on appellant's behalf that, by accepting payment of the amount due on the first note after it had matured, without giving notice of his intention to insist upon the stipulation in the mortgage, the appellee waived his right to treat the whole debt as due. Hence, the argument proceeds, since it affirmatively appears by the averments in the complaint that payment of the first note had been accepted before suit brought, the conclusion follows that no part of the debt remaining unpaid was due, and that it was, therefore, error to overrule the appellant's demurrer to the complaint. This position can not be maintained. The provision in the mortgage for accelerating the time when the whole debt should become due and collectible did not make the maturity of the debt evidenced by the second note depend upon the election of the mortgagee. The second note became absolutely due upon failure to pay the first note at maturity. According to the terms of the contract, upon the happening of that event, the whole debt became as effectually and absolutely due as if further credit had not been, in any contingency, agreed upon. The mortgagor had then the right to pay or tender the whole debt, and by that means suspend the accumulation of interest. The acceptance of a part by the mortgagee did not defeat the right of the mortgagor to pay or tender the balance at once, nor did it, without a new agreement, extend the time or prevent the former from enforcing payment of what remained unpaid.

Provisions such as that under consideration are not in the nature of penalties, nor have they anything in common with forfeitures, but are to be regarded as nothing more than agreements between the parties, fixing the time and the con-

ditions upon which the whole debt may become due. Such an agreement may be as advantageous to the payor as to the payee. *Buchanan* v. *Berkshire L. Ins. Co.*, 96 Ind. 510; *Malcolm* v. *Allen*, 49 N. Y. 448; 1 Pom. Eq. Jur., section 439; 2 Jones Mortg., section 1186.

Under a provision which gives the creditor the exclusive right to elect, within a time fixed, whether or not he will treat the whole debt as due in case the debtor makes default in paying interest, it may well be that the unconditional acceptance of interest by the creditor, after the expiration of the time, without notice of the election, would waive the default. 2 Jones Mortg., section 1186. Or if the default was induced by the fraudulent or inequitable conduct of the creditor, or by any agreement or promise upon which the debtor might rely which operated to mislead or throw the debtor off his guard, a court of equity would interfere to stay proceedings, or the action might be abated upon the facts being properly pleaded. *Sire* v. *Wightman*, 25 N. J. Eq. 102; *Wilson* v. *Bird*, 28 N. J. Eq. 352; *Bell* v. *Romaine*, 30 N. J. Eq. 24; *Tompkins* v. *Tompkins*, 21 N. J. Eq. 338; *Noyes* v. *Clark*, 7 Paige, 179; *Bennett* v. *Stevenson*, 53 N. Y. 508; *Wilcox* v. *Allen*, 36 Mich. 160; 1 Pom. Eq. Jur., section 439.

As nothing appears in the complaint except that the appellant failed to pay the first note at maturity, presumptively the whole debt then became due, and the acceptance by the creditor of a part did not, without more, affect his right to enforce the condition in the mortgage.

The next objection to the complaint is that there is a variance between the note as it is described in the mortgage and the copy exhibited with the complaint.

The only variance pointed out is that the mortgage describes the note as bearing interest "payable annually," while in the note exhibited those words are omitted. There is no merit in this objection.

With the general denial the defendant filed a second paragraph of answer, in which matter tending to show an excuse

for not paying the first note at maturity, by reason of an agreement on the part of plaintiff to extend the time, is alleged.

The matter thus pleaded tended to show that the action was prematurely brought, and, if available for any purpose, it was not available by plea in bar. It went in abatement of the action, and having been pleaded in bar without verification the plea might have been, with propriety, stricken out. Section 365, R. S. 1881. As, however, an equivalent result was reached by sustaining a demurrer to it, no available error was committed. *Glidden* v. *Henry*, 104 Ind. 278; *Dwiggins* v. *Clark*, 94 Ind. 49; *Hayne* v. *Fisher*, 68 Ind. 158; 1 Works Pr., section 570.

Pleas in bar are addressed to the merits of the claim, and go to impair or defeat the action altogether; whereas pleas in abatement tend merely to defeat or suspend the suit for the time being. The plea under consideration was of the latter class, and was, therefore, not properly pleaded with defences in bar.

A different question would have been presented if the demurrer had been overruled. The case would then have been within the ruling in *State, ex rel.*, v. *Ruhlman*, 111 Ind. 17.

A bill of exceptions shows that on the 16th day of July, 1885, the parties, by agreement entered of record, caused the case to be set down for trial on the ensuing 21st day of July. On the 20th day of July the appellant filed an affidavit in compliance with the statute, and moved the court for a change of judge.

This motion was overruled. A rule of court embodied in the bill requires affidavits for changes of venue to be presented, when it is practicable, before the case is "called for trial." There is nothing in the bill to indicate that the case had been called for trial, except as above shown, and the record shows that the case was not in fact tried until the 25th day of July.

Conceding, so far as the decision of this case requires, the

propriety of the rule requiring applications for changes of venue to be made before the case is called for trial, the application in question does not seem to have been within the prohibition of the rule. It did not follow, because the case had been set for trial by agreement on the 21st of July, that it was also called for trial on the 20th. It follows rather that it could not have been so called before the day on which the trial was set, except by the mutual agreement of parties.

Setting a case for trial is an entry or order made in the cause by the court, either of its own motion, in regulating its business in compliance with the statute, or the rules of court made conformably therewith, or by agreement of parties, by which a day certain is fixed, on or after which the case may be called for final disposition or trial. Calling a case for trial is an announcement or declaration by the court that the cause has been reached in its order, and that the judicial examination of the issues of law or fact upon which the decision of the cause depends is about to begin.

The bill of exceptions does not show that the case had been called for trial, and, within the rule of the court above referred to, the statutory right of the appellant to move for a change of judge should have been entertained when the proper affidavit was presented. 2 Works Pr., section 1269; *Shoemaker* v. *Smith*, 74 Ind. 71; *Krutz* v. *Howard*, 70 Ind. 174.

Judgment reversed, with costs.

Filed Dec. 6, 1887.

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113 581
117 298
112 489
150 164

No. 13,689.

STANLEY v. DAILEY ET AL.

NEW TRIAL.—*As of Right.—Bond.—Defects.—Curative Statute.*—Defects in a bond executed by a party under section 1064, R. S. 1881, upon applying for a new trial as of right, are cured by section 1221, and the principal and sureties in such bond are bound as fully as if it were in all respects according to the statute requiring it.

SAME.—*Setting Aside Order Granting.—Waiver of Objections to Bond.*—The omission of the words "and damages" from such a bond does not authorize the setting aside of the order granting the new trial, on a motion made a year later, and in the absence of any previous objection to the sufficiency of the bond as executed and approved. In such case the objection to the bond, being technical and not having been made at the proper time, will be deemed waived.

From the Sullivan Circuit Court.

J. S. Bays, W. S. Maple, J. T. Beasley and *A. B. Williams*, for appellant.

J. C. Briggs, J. C. Chaney and *S. C. Coulson*, for appellees.

ZOLLARS, J.—Appellant brought this action to quiet her title to the land described in her complaint. Silas Dailey and Melissa J. Knight, appellees here, were defendants below, and filed answers and cross-complaints.

Upon a trial of the cause the court found against appellant, and in favor of appellees, both upon appellant's complaint and upon their cross-complaints.

On the 3d day of July, 1885, appellant made an application for a new trial as a matter of right under the statute, and filed a bond with a surety, which was approved by the court, conditioned that she should pay to appellees, or either of them, all costs that might be recovered against her in the cause.

On the 12th day of October, 1886, appellees filed separate motions asking that the order granting a new trial as of right, on the 3d day of July, 1885, might be set aside and

the cause be stricken from the docket. Those motions were based upon the ground that the bond filed by appellant, while it provided for the payment of costs, did not provide for the payment of such damages as might be recovered against appellant. The court set aside the order granting a new trial and struck the cause from the docket.

The statute provides that the court rendering judgment in a case like this, on application made within one year thereafter by the party against whom judgment is rendered, etc., and on the applicant giving an undertaking, with surety, to be approved by the court or clerk, that he will pay all costs and damages which shall be recovered against him in the action, shall vacate the judgment and grant a new trial. R. S. 1881, section 1064.

That this case, being one to quiet title to land, is one in which, under the statute, a new trial may be demanded as of right without cause, is conceded. See *Physio-Medical College* v. *Wilkinson*, 89 Ind. 23, and cases there cited.

The bond filed by appellant and approved by the court is not as broad in its terms as the statute requires. There are omitted from it the words "and damages." We are satisfied, however, that, under the law and the peculiar circumstances of this case, that omission was not of itself sufficient to justify the court in setting aside the order granting a new trial and striking the cause from the docket. In the first place, the bond, while informal, was not invalid. It secured to appellees all that would have been secured to them by a bond in every respect formal, and in the words of the statute. We have a statute which provides that "no bond, recognizance, or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance, or written undertaking to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in

the bond or recognizance. In all actions on a defective bond, recognizance, or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance, or written undertaking were perfect in all respects." R. S. 1881, sec. 1221.

Under this statute appellant and her surety were bound just as fully for all damages that might have been recovered in the action as if the bond had contained the words "and damages." It was a bond taken by the judge, an officer, in the discharge of the duties of his office, and, in the language of the statute, appellant and her surety were bound by it "to the full extent contemplated by the law requiring the same." That this is so, is settled by many decisions of this court. *Opp* v. *Ten Eyck*, 99 Ind. 345, and cases there cited. See, also, *Yeakle* v. *Winters*, 60 Ind. 554; *Vincennes Nat'l Bank* v. *Cockrum*, 64 Ind. 229; *Hawes* v. *Pritchard*, 71 Ind. 166; *Patterson* v. *State*, 10 Ind. 296; *State* v. *Soudriette*, 105 Ind. 306, and cases there cited.

An application to the present statute of the strict rules applied to the former statute, requiring the payment of all costs as a condition precedent to the granting of a new trial as of right and without cause, would require a holding here that appellees might have demanded that the bond should be upon its face strictly as the statute provides. And had they objected to the bond at the time it was filed, on the ground that it did not contain the words "and damages," it would have been the duty of the court to require a bond containing those words, and to have denied a new trial had appellant declined to file such a bond. But in the case before us appellees neither demanded such a bond, nor did they object to the bond, although present in court when it was filed, on the ground that it did not contain the words "and damages." They made no objection to the bond until more than a year after it had been accepted and approved and the new trial granted. It is stated in the record made by the clerk that, at the time the new trial was granted, appellees each excepted

to the ruling of the court in granting a new trial, but the ground of the objection is not stated. There is no mention of any objection to the bond. Dailey filed a bill of exceptions, in which it is recited that to the granting of a new trial he objected; that the court overruled his objection and granted appellant a new trial as of right under the statute, to which ruling of the court he excepted; but there is nothing to show that he in any way objected to the bond.

So far as shown by the record, nothing further was done in the case until the 22d day of June, 1886. It is recited in the record that on that day, the parties being present by their counsel, the court appointed Hon. A. G. Cavins as a special judge to try the cause. It is further recited in the record that, on the 24th day of the same month, the parties being present by their counsel, the special judge thus appointed appeared, accepted the appointment, and set the cause for trial on the 29th day of the same month. On the day set for trial appellee Dailey filed a motion, supported by an affidavit, for a change from the special judge, stating in his affidavit that neither he nor any of his attorneys "who had taken an *active part* in the defence of the cause was present in court on the 24th when the cause was set for trial." The change was granted, and Hon. B. E. Rhoads was appointed to try the cause. Appellee Dailey filed a bill of exceptions, in which it is stated that he entered a special appearance and filed his motion and affidavit for a change of judge, and that he objected and excepted to the appointment of Mr. Rhoads to try the cause.

It is recited in the record still further that, on the 30th day of the same month, appellant and appellee Dailey being present in court by counsel, Mr. Rhoads appeared and accepted the appointment as special judge to try the cause, and that the cause was by him continued until the next regular term. It will thus be seen that, although present in court by counsel when the bond was tendered and approved, and although thus present in court at various times subsequently

when steps were being taken in the cause, and more than once upon the motions of appellees, no objection was made to the bond by either of them until more than a year after the bond had been approved, and more than a year subsequent to the rendition of the judgment. Had the objection finally made to the bond been made at the time it was filed, or at any time during the year subsequent to the judgment, it would have been an easy matter for appellant to have filed a new bond, and have thus procured, if need be, a new order for a new trial under the statute. We think that, having thus remained silent, appellees should not be allowed to defeat appellant's right to a new trial under the statute by the technical objection urged to the bond after the expiration of the year given her by the statute in which to procure such a new trial. It has often been held that such technical objection to bonds must be made at the earliest opportunity, and that objections to the granting of new trials under the statute will be regarded as waived unless made at the proper time. We think it clear that, in this case, appellees by their course should be held to have waived the objection they finally made, and now urge, to the bond. *Hutchinson* v. *Lemcke*, 107 Ind. 121; *Gann* v. *Worman*, 69 Ind. 458; *Marsh* v. *Elliott*, 51 Ind. 547; *Vernia* v. *Lawson*, 54 Ind. 485; *Trueblood* v. *Knox*, 73 Ind. 310; *Carver* v. *Carver*, 77 Ind. 498.

The judgment is reversed, at appellees' costs, and the cause is remanded, with instructions to the court below to reinstate the cause upon the docket, and to set aside its order vacating the order of July 3d, 1885, granting a new trial to appellant.

Filed Dec. 6, 1887.

112 494
113 557

112 494
131 98

112 494
161 511

112 494
164 276

112 494
165 669

112 494
171 672

No. 12,837.

VOGEL *v.* HARRIS ET AL.

BILL OF EXCEPTIONS.—*Practice.*—*Statute Construed.*—Where, under the provisions of section 626, R. S. 1881, time is allowed by the court within which to file a bill of exceptions, all the rulings in the case, made on that day, may, if properly excepted to, be embraced in the bill, notwithstanding the fact that some of such rulings intervened between the overruling of the motion for a new trial and the action of the court in fixing the time for the completion of the bill.

WITNESS.—*Cross-Examination.*—*Proper Scope of.*—Where a general subject is brought out in the direct examination of a witness, the cross-examining party is not confined to the phases of the subject so brought out and opened, nor bound by the line of direct examination, but may ask any proper question on the general subject referred to in the examination in chief.

EVIDENCE.—*Conclusion.*—A question to a witness, which asks for the statement of an arrangement or agreement between parties, is not objectionable as calling for a conclusion.

CONTRACT.—*Agreement not to Collect Debt.*—*Breach of.*—*Damages.*—A covenant by a creditor not to collect a debt does not impair such indebtedness, but simply vests in the debtor a right to recover damages for a breach of the agreement.

From the Allen Superior Court.

L. M. Ninde, for appellant.

W. H. Coombs, *R. C. Bell* and *S. L. Morris*, for appellees.

ELLIOTT, J.—Appellees' counsel contend that the evidence is not in the record on the motion for a new trial, and support their contention by a vigorous argument.

The record shows that a motion for a new trial was filed on the 30th day of January, 1885, and was overruled on that day. No time was immediately asked in which to file a bill of exceptions, or to embrace the ruling on the motion in a bill. The ruling was directly followed by a motion for a *venire de novo*. This motion was overruled, whereupon the appellant secured the following entry to be made: "To which judgment the defendants further except, and are given sixty

days time from the date hereof in which to settle and file their bill of exceptions."

An exception was, however, entered at the time the motion for a new trial was overruled. Counsel quote that part of section 626, R. S. 1881, which reads thus: "*Provided*, That if a motion for a new trial shall be filed in a cause in which such decision, so excepted to, is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion, and time may be then given by the court within which to reduce such exception to writing," and ask us to decide that the bill of exceptions does not present the evidence on the ruling denying the new trial.

We can not assent to counsel's doctrine. In our opinion the leave to file the bill embraced all the exceptions taken at the time the entry was made, for the proceedings at that time are not to be dissected into minute parts. The fair and just interpretation of the record is, that the leave obtained referred to all the rulings made on the day it was asked and secured. The question is fully discussed in *Kopelke* v. *Kopelke*, *ante*, p. 435, and we deem it unnecessary to again discuss it.

This action was brought by the appellees to recover the possession of personal property which the appellees claimed had been obtained from them by fraud. In his brief appellant's counsel says of the appellees' evidence that "I concede that it tended to show that at the time the appellant purchased the goods the appellees believed he was solvent; that he so represented to them, and by such representations procured the appellees to ship the goods to him. The plaintiffs' testimony further tended to show that, at the time the appellees' claim these representations were made, the appellant knew he was insolvent, and did not intend to pay for the goods."

Counsel, while making these concessions as to the effect of the appellees' evidence, asserts that it was contradicted by the appellant's evidence in so far as it tended to prove

that the appellant intended to defraud the appellees, and in this he is supported by the record.

The appellant proved that he owed to his wife and to his sister $14,000, and that his personal property was worth five or six thousand dollars. He also testified that he did not intend to defraud the appellees when he bought the goods. He offered to prove that he had an arrangement with his wife and his sister that they would give him time, that they would not press their claims, and would not interfere with the payment of his commercial debts.

In answer to appellant's argument on this point, the counsel for appellees insist that the question asked was not proper on cross-examination. In this they are in error. They had opened on the subject of the appellant's fraud and his financial condition, and they laid open the whole subject for cross-examination. It is a mistake to suppose that cross-examining counsel are confined to the phases of a subject opened on the direct examination, for the rule is well settled that, where a general subject is brought out in the direct examination, the cross-examining party may ask any proper question on the general subject, and is not bound to follow the line of examination laid out by the examination in chief. *DeHaven* v. *DeHaven*, 77 Ind. 236; *Louisville, etc., R. W. Co.* v. *Falvey*, 104 Ind. 409.

The objection to the form of the question is not tenable. A question which asks for the statement of an arrangement or agreement between parties does not call for a conclusion. This was the question asked, for it called for the character of the debts due to the appellant's wife and sister.

We think, however, that the objection that the question did not relate to the time of the purchase of the goods is well taken. The material inquiry was as to the appellant's financial condition and his intention at the time he bought the appellees' goods. What he then did and said, and what was then his financial condition, were the material matters. We are also of opinion that the evidence was incompetent

because the agreement between the appellant and his wife and his sister did not affect the question of his solvency so long as the debt remained unpaid. If he owed the debt it could not be excluded from consideration because of an agreement not to press its collection. The covenant not to collect it did not discharge the debt, but simply vested in the appellant a right to recover damages for a breach of the agreement. *Reed* v. *Shaw*, 1 Blackf. 245; *Mendenhall* v. *Lenwell*, 5 Blackf. 125 (33 Am. Dec. 458); *Thalman* v. *Barbour*, 5 Ind. 178; *Irons* v. *Woodfill*, 32 Ind. 40; *Mills* v. *Todd*, 83 Ind. 25; *Williams* v. *Scott*, 83 Ind. 405 (411).

It is quite clear, therefore, that, upon the most favorable view for appellant that can be taken, the evidence was incompetent.

Appellant, having been examined in chief by the appellees, was asked this question, on cross-examination: "Mr. Vogel, what in your judgment, I mean what was your judgment, in May and in the latter part of August, 1883, as to the value of the house and lot where you reside?" We think there was no material error in refusing to permit the witness to answer this question. It was admitted on the trial that the appellant, at the time the goods were purchased, was insolvent and unable to pay his debts, and it was not material what value he placed upon a particular piece of property. The written agreement settled the question of his insolvency, and the value of the property mentioned could not affect the question. But, if we are wrong in this, the evidence is so overwhelmingly against the appellant that we should not feel justified in reversing the judgment even if the appellant's opinion as to the value of one piece of his property was erroneously excluded.

Judgment affirmed, at the costs of Veronica Vogel, administratrix of the estate of Frank B. Vogel, deceased, to be levied of the assets of said estate.

Filed Dec. 8, 1887.

112	498
120	419
112	498
120	375
112	498
131	37
132	329
112	498
149	440
150	7
150	69
152	586
112	498
160	222
f112	498
170	137
f170	454

No. 14,022.

FARRIS v. JONES ET AL.

INJUNCTION.—*County Commissioners.—Erection of Bridge.—Complaint.—Interest of Party.*—A complaint to enjoin the county commissioners from contracting for the erection of a bridge is bad, if it is not shown that the plaintiff has an interest in the cause of action or that he will be affected by the proposed contract.

PLEADING.—*Supplemental Complaint.—Separate Demurrer Unauthorized.—Practice.*—A supplemental complaint constitutes a part of the original complaint, and a separate demurrer to it will not lie, and, if filed, it should be disregarded.

SAME.—*When Complaint Stands as Unchallenged.*—Where, after the filing of a supplemental complaint, the defendant demurs separately to it and to the original complaint, such demurrers should not be entertained, and the complaint, as a whole, in the absence of further pleadings, will stand as unchallenged and unanswered.

SAME.—*Each Paragraph of Complaint Must be Complete.*—Each paragraph of a complaint must be complete in itself, and omitted or defective allegations of fact in one paragraph can not be supplied or cured by reference to another paragraph.

SAME.—*Demurrer.—Want of Facts.—Right to Maintain Suit.*—A demurrer to a complaint for the alleged insufficiency of facts questions both the sufficiency of the facts stated to constitute a cause of action and the right of the particular plaintiff to maintain the suit.

From the Martin Circuit Court.

H. McCormick, for appellant.

T. M. Clarke, C. S. Dobbins, T. J. Brooks, S. M. Reeve, H. Q. Houghton and *J. T. Rogers*, for appellees.

HOWK, J.—This suit was commenced by appellant, Farris, as plaintiff, against the appellees, Jones, Chattin and Porter, the acting board of commissioners of Martin county, as defendants, on the 29th day of July, 1887. At the ensuing September term, 1887, of the court below, the parties appeared and appellant filed what is called his supplemental complaint herein. Thereafter, at the same term, appellees' demurrers to the original and supplemental complaints, for

the alleged want of facts therein respectively, were severally sustained by the court. Thereupon, at the same term, with the leave of court first had, appellant filed the third paragraph of his complaint herein. Appellees' demurrer to this third paragraph of complaint, for the alleged insufficiency of the facts therein alleged to constitute a cause of action, was also sustained by the court. Appellant then declining to amend or plead further, it was adjudged by the court that he take nothing by his suit, and that appellees recover of him their costs expended herein.

From such judgment this appeal is prosecuted, and the appellant assigns here as errors the sustaining of the several demurrers to the several paragraphs of his complaint herein.

The record fails to show that appellant excepted at the time to the rulings of the court below in sustaining appellees' demurrers to the original complaint, or to what is called the supplemental complaint herein. Therefore it is claimed by appellees' counsel that no questions are saved in and presented by the record by the decisions of the court upon the demurrers to the original and supplemental complaint for the consideration of this court. In other words, counsel claim that, by reason of appellant's failure to except to such decisions, his original and supplemental complaints are practically, at least, out of the record of this cause, and form no proper part thereof, on his appeal from the judgment below to this court. Ordinarily, no doubt, the claims of appellees' counsel, in regard to the effect of appellant's failure to except at the time to the rulings of the court upon the demurrers to his original and supplemental complaints, would be correct, but, as applied to the record in this cause, we think their claims are incorrect and erroneous.

It is shown by such record that appellant filed his supplemental complaint on the 8th day of September, 1887, stating therein matters of fact which had occurred after the filing of his original complaint. Afterwards, on the 13th day of September, 1887, and not before, appellees filed their two de-

murrers herein, one to the original complaint and the other to the supplemental complaint, which demurrers were sustained by the court on the same day.

It is settled by our decisions, that as a supplemental complaint constitutes only a part of the original complaint, after the filing of the former pleading, a demurrer will not lie to such supplemental complaint, and, if filed, it ought to be disregarded. "Such supplemental complaint does not supersede the original, but both stand and constitute the complaint. As such pleading only constitutes a part of the complaint, a demurrer to it is unknown to our practice, and the court was authorized to disregard it." *Morey* v. *Ball*, 95 Ind. 450; *Derry* v. *Derry*, 98 Ind. 319.

"A supplemental complaint is not, like an amended complaint, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint and assumes that the original complaint is to stand." *Musselman* v. *Manly*, 42 Ind. 462; *Davis* v. *Krug*, 95 Ind. 1; *Simmons* v. *Lindley*, 108 Ind. 297.

The rule of practice which forbids the filing of a demurrer to a supplemental complaint results from the general rule that, under our civil code, a demurrer will not lie to a part of a paragraph of complaint, or other pleading. Section 338, R. S. 1881; *Reno* v. *Tyson*, 24 Ind. 56.

Of course, there are exceptions to this general rule of practice, as, in cases of suits upon bonds, when several breaches have been assigned in a single paragraph of complaint, we have often held that the sufficiency of each breach may be tested by a separate demurrer. *Colburn* v. *State, ex rel.*, 47 Ind. 310; *Mustard* v. *Hoppess*, 69 Ind. 324; *Sheetz* v. *Longlois*, 69 Ind. 491.

The case in hand does not fall within any of the exceptions to the general rule of practice that a demurrer will not lie to part of a paragraph of complaint. Here, the appellees did not demur until after appellant had filed his supplemental complaint herein, and it and the original complaint

had become and were only one complaint. To the one complaint, as thus constituted, appellees did not demur, but instead thereof, as we have seen, they filed separate demurrers to the separate parts of such complaint for the alleged insufficiency of the facts therein to constitute a cause of action. The court below ought not, we think, to have entertained or ruled upon these separate demurrers to the separate parts of the one complaint, as then constituted, but ought rather to have rejected, or at least disregarded, such demurrers, as unknown to our practice under the civil code, and to have required appellees to plead further. Certainly, the court erred in entertaining these separate demurrers to the separate parts of the complaint as then constituted, and in holding the cause of action therein stated bad by piecemeal, by an unwarranted procedure unknown to our practice.

Upon this state of the record, we are of opinion that appellant's complaint, as it was constituted upon the filing of his supplemental complaint, stands unchallenged by demurrer and unanswered by appellees; and that, without issue of law or fact joined on such complaint, the judgment of the court below, that appellant take nothing by his suit herein, rendered as upon the sustaining of a demurrer to such complaint, is wholly unauthorized by law and void.

The original complaint herein was filed on the 29th day of July, 1887, by appellant, a resident citizen and taxpayer of Martin county, to enjoin appellees, as members of the board of commissioners of such county, from contracting for the erection of a bridge over the east fork of White river at a point where, as alleged, there was not then, and never was, any public highway leading thereto or therefrom. We need not set out the facts stated in the complaint, in this opinion, nor need we argue for the purpose of showing that such facts were abundantly sufficient to justify the intervention of a court of equity to prevent appellees from contracting for the erection of such bridge. It will suffice to say that, upon the facts stated in such original complaint, the court

below, as a court of equitable cognizance and powers, did intervene and, by a temporary order to that end, properly restrained appellees from contracting for the erection of the aforesaid bridge until the ensuing September term of such court. At that term, appellant filed his supplemental complaint, stating therein facts which had occurred, in connection with the subject-matter of the suit, after the filing of his original complaint, and showing that the necessity for an injunction against the unlawful acts and proceedings of the appellees continued unchanged. Upon the filing of this supplemental complaint, it and the original complaint, as we have seen, became and were only one complaint; and this complaint stated facts amply sufficient, we think, to constitute a cause of action in appellant's favor and to entitle him to the relief prayed for therein.

With leave of the court first had, appellant filed an additional and third paragraph of complaint, to which appellees' demurrer for the alleged want of facts was sustained by the court.

The appellant at the time excepted to this ruling of the court, and has here assigned the same as error. In this paragraph of complaint appellant seeks to enjoin appellees, as members of the county board, from contracting for the erection of the same bridge over the east fork of White river heretofore mentioned herein. It is insisted by appellees' counsel that this third paragraph of complaint was clearly bad on the demurrer thereto, for the reason that it was not shown by any proper averment therein that appellant had any possible interest, near or remote, in the cause of action attempted to be stated in such paragraph. It was not alleged therein that he was a taxpayer of Martin county, or that he would or could be injured or affected in any manner or to any extent by the erection by appellees of the proposed bridge over the east fork of White river. Under our civil code the rule of pleading is familiar which requires that each paragraph of a complaint must be complete and perfect in

and of itself, and that omitted or defective allegations of fact in one paragraph can not be supplied or cured by reference to the averments of another paragraph. *Smith* v. *Little*, 67 Ind. 549; *Entsminger* v. *Jackson*, 73 Ind. 144; *Lynn* v. *Crim*, 96 Ind. 89; *Ludlow* v. *Ludlow*, 109 Ind. 199.

So, also, we have held, and correctly so, we think, that a demurrer to a paragraph of complaint, for the alleged insufficiency of the facts stated therein, calls in question not only the sufficiency of the facts averred in such paragraph to constitute a cause of action, but also the right or authority of the particular plaintiff to institute or maintain a suit upon such cause of action. *Pence* v. *Aughe*, 101 Ind. 317; *Wilson* v. *Galey*, 103 Ind. 257; *Walker* v. *Heller*, 104 Ind. 327; *Frazer* v. *State, etc.*, 106 Ind. 471.

The demurrer to the third paragraph of complaint was correctly sustained.

The judgment is reversed, with costs, and the cause is remanded, with instructions to require by rule defendants to answer the complaint herein, as composed of the original and supplemental complaints, with leave to plaintiff to amend, and for further proceedings not inconsistent with this opinion. Appellees' motions to strike out parts of the record, and to dissolve the restraining order granted by this court, are denied, with costs, and the rule against appellees to show cause, etc., is discharged, at their costs.

NIBLACK, J., was absent when this cause was considered and decided.

Filed Dec. 6, 1887.

No. 13,573.

SISK v. CRUMP.

112 504
120 474
112 504
134 276

NEGLIGENCE.—*Barbed Wire Fence Along Highway.—Liability of Land-Owner.*—The act of a land-owner in erecting upon his property, and along the line of a public highway, a barbed wire fence, does not in itself render him liable to one who sustains an injury therefrom, but there may be a liability if the fence is constructed and maintained in such a manner as to constitute negligence and a breach of duty owed to others or to the community.

SAME.—*Injury to Animal Wandering Upon Highway.—When Owner May Recover Damages.*—Where an order has been made by the proper authorities permitting horses and cattle to run at large, a land-owner, who negligently constructs and knowingly maintains in such a manner as to be dangerous, and in effect a trap, a barbed wire fence between his pasture-field and the adjacent highway, is liable for the value of a horse which, while feeding along the highway, is attracted by other horses within the field and by the growing grass therein, and in attempting to enter the enclosure becomes entangled in the wires and is killed.

From the Bartholomew Circuit Court.

F. T. Hord and *M. D. Emig*, for appellant.

W. F. Norton and *S. W. Smith*, for appellee.

ELLIOTT, J.—Stated in a condensed form, the material allegations of the appellant's complaint are these: On and prior to May 5th, 1885, the appellee owned fifteen acres of land, bounded on the east by a public street of the city of Columbus, and along the line of this street he had constructed a barbed wire fence. The fence was composed of wooden posts and five strings of barbed iron wire. It was negligently constructed; the posts being insufficient to keep the wire at a proper tension, and the wires were not drawn into proper position. The wires were armed with sharp iron barbs placed along them at a distance of two inches apart. They were negligently suffered to sag down near the ground. They hung loosely from the posts, and in such a condition as that a horse coming in contact with them would be en-

tangled and thrown down. The fence was not such as a good husbandman would construct or maintain, but was insufficient and dangerous, its height not being sufficient to keep off horses or cattle, and there being no plank or other thing to warn them of the existence of the fence. The fence could have been made safe by placing a board along the top of it, and the wires could have been kept at a proper height and tension, but the defendant, knowing its dangerous condition, suffered it to remain insufficient to warn off animals. It was not sufficient in height, as the defendant knew, to prevent animals from attempting to cross it. On the 5th day of May, 1885, the horse escaped from the stable of the plaintiff, in which it had been fastened, and, without fault on her part, wandered upon the street bounding the defendant's land. At that time the land was covered with green grass, on which the horses of the appellee were feeding. The appellant's horse was attracted by the green pasture and the horses feeding on it, and attempted to cross into the field. In attempting to cross the fence it was, by reason of the dangerous and unsafe condition thereof, entangled in the loose wires, thrown down and killed. The proper county and city officers had, by orders duly made, authorized owners of horses and cattle to permit them to run at large.

The complaint can not be upheld on the ground that erecting a barbed wire fence along the line of a highway, but on private property, is in itself an actionable wrong. The courts can not say, as matter of law, that erecting such a fence is a tort. We can not, therefore, yield to the contention of counsel that the act of an individual in erecting a fence of that kind in itself renders him liable to one who sustains an injury. Courts can not judicially know that such a fence is dangerous. Our statute recognizes the right to use such fences, for it is expressly provided that railroad companies may use them in fencing their tracks. Act of 1885.

The complaint before us, however, does not rest solely on the theory that the erection of a barbed wire fence is neces-

sarily a tort. It goes much further, and, with great particularity, avers that the fence was so constructed as to be dangerous to horses and cattle passing along the highway. Nor does it stop there. It avers that beyond the fence was growing grass, on which horses were feeding, and that these things would attract horses and induce them to attempt to cross the fence and enter the enclosure. There are, therefore, two important elements to be considered:

1st. The negligence in constructing and knowingly maintaining a dangerous fence along the line of a highway.

2d. The probability that animals would be attracted by what they saw within the enclosure, and would probably attempt to enter it.

These two elements exert an important influence upon that branch of the case which presents the question whether the appellee's act was culpably negligent.

It is well settled that a lawful act may be done in such a negligent manner as to make the person who does it a wrongdoer. It may be, therefore, that although erecting a barbed wire fence is not in itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. A thing may not be dangerous if properly constructed, but dangerous if improperly constructed. The complaint before us shows that the appellee was negligent in constructing and maintaining the fence, and on that point we have no hesitation in declaring it to be sufficient.

Negligence is not always actionable. A man may do many negligent things on his own premises and yet not incur any liability. Negligence is only actionable where it involves a breach of duty. This rule is illustrated by the cases which hold that there can be no recovery for injuries caused by the negligence of the owner of land in suffering the premises to become unsafe, unless the injured person came on the land under an express or implied invitation. *Nave* v. *Flack*, 90 Ind. 205 (46 Am. R. 205); *Evansville, etc., R. R. Co.* v.

Griffin, 100 Ind. 221 (50 Am. R. 783); *Indianapolis, etc., R. W. Co.* v. *Pitzer*, 109 Ind. 179.

There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some duty to the person who sustains the injury.

While it is essential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to the community owes it, as a general rule, to every member of the community, and, if any member suffers a special injury from a breach of that duty, an action will lie. The pivotal question in this case, therefore, is, whether the defendant was under a general duty to maintain the wire fence so that it would not inflict injury upon animals which might be tempted from the highway into his enclosure?

The theory of the complaint is that the horse was injured while attempting to cross the fence into the defendant's enclosure, and not that it was injured while simply wandering along the highway. If the horse had been injured while going along the highway a very different question would have been presented; but that is not the case which the complaint undertakes to make. The case is, therefore, not governed by the authorities which hold that an action will lie against one who makes the use of a highway dangerous, and the cases of *Graves* v. *Thomas*, 95 Ind. 361 (48 Am. R. 727), and *Beck* v. *Carter*, 68 N. Y. 283 (23 Am. R. 175), are not in point.

The complaint does not aver that the fence was intentionally made dangerous for the purpose of injuring persons or animals that might trespass on the defendant's land. The cases which assert and extend the old doctrine that spring-traps and guns shall not be set to catch trespassers have no application, for here the negligence charged against the defendant is nothing more than the failure to exercise proper care in constructing and maintaining the fence. The cases

of *Hooker* v. *Miller*, 37 Iowa, 613, *Deane* v. *Clayton*, 7 Taunt. 489, and similar cases, can exert no influence upon this investigation.

The case of *Henry* v. *Dennis*, 93 Ind. 452 (47 Am. R. 378), does not belong to the same class as the present, for in that case the poisonous substance which caused the injury was placed in the street. Here the fence was on the defendant's own land, and the rule declared in the case cited can not apply.

The defendant did nothing to entice the plaintiff's horse to leave the highway. If the defendant had purposely placed feed near the highway, and thus tempted animals wandering along it to enter his enclosure, a different case would confront us; but, here, the land was covered with grass and herbage, the usual and natural growth of the season. Nature clothed the field with the grass, not the defendant.

At common law this action could not be maintained, because owners of animals are forbidden to allow them to run at large; but our statute changes this rule of the common law, and invests the board of county commissioners with authority to permit domestic animals to run at large. *Welch* v. *Bowen*, 103 Ind. 252.

The complaint avers that the proper order had been made, so that, in permitting the horse to wander upon the highway, the appellant was not guilty of any wrong.

The order of the board permitting animals to run at large forms an important element in the case, not only as bearing upon the question of contributory negligence, but also as bearing upon the question of the appellee's negligence. It bears upon the latter question, because it made it the duty of the appellee to take notice that horses and cattle might wander upon the highway, and with this knowledge he had no right to do anything that was reasonably certain to cause injury to animals passing along the highway. Knowing, as he did, that animals might lawfully wander along the highway, he owed a duty to the community to use ordinary care

to prevent any act of his from causing injury to animals wandering near his land.

"Enjoy your own property in such a manner as not to injure that of another person" is a maxim of the law that rules many cases, and we think it must rule the one at bar. The appellee had a right to select his own fence, but he had no right, under the circumstances stated in the complaint, to construct it so as to make it dangerous to animals passing along the highway, for, in doing so, he violated the maxim we have quoted. Suppose he had dug a deep trench along the line of the highway and had covered it with planks so thin as to give way beneath the weight of the smallest domestic animal, would he not be liable to the owner of a horse killed in attempting to cross the trench? Again, suppose that a land-owner places posts along the line of his land and attaches wires near the ground, where they would be hidden by the grass or weeds, would he not be liable to the owner for the value of a horse caught in the wires and killed? The case as made by the complaint is in principle the same as the cases we have given as illustrations.

The land-owner is not bound to maintain a secure fence, nor, indeed, any fence; but if he does undertake to maintain a fence along a highway he must not negligently suffer it to become dangerous to passing animals. His duty is to exercise reasonable care to prevent his fence from becoming dangerous, but it extends no further. If the fence he elects to build is built as such fences are usually built, there is no liability; but if it is allowed to get out of repair, and thus become essentially dangerous, he may be liable. He is not under any duty to place boards on the top of a wire fence, or to do any like act; but he is bound to use care to keep the fence from becoming a trap to passing animals.

It is the duty of land-owners to take notice of the natural propensity of domestic animals, and, under the allegations of this complaint, it was the duty of the appellee to take notice of the propensity of horses to seek the pasture within his en-

closure and join others of its kind feeding there. In view of the facts that the board of commissioners authorized animals to run at large, that the appellee was chargeable with notice of this order, that he was bound to know that it was probable that animals wandering on the highway would seek his pasture, and that the fence was so maintained along the highway as to be in effect a trap to passing animals, we think the complaint must be held good. These are the controlling facts, and they make the complaint good. It is not the kind of fence selected, nor is it the absence of top planks or the like, that influences our judgment, but what chiefly influences it is this: the fence was so negligently maintained that, under the circumstances stated in the complaint, it was in effect a trap into which it was in a great degree probable that passing animals would be caught and injured. Had the fence, although composed of barbed wires, been constructed and maintained as ordinarily prudent husbandmen usually construct such fences, our conclusion would be altogether different; but the complaint very clearly avers that it was not so constructed or maintained. The appellant assumed all risks from fences, whatever their kind, constructed and maintained with ordinary care, but she did not assume risks from fences known to be intrinsically dangerous constructed along the line of a public highway.

We regard the location of the dangerous fence immediately along the line of the highway as an important element in the case. The strong probability that the pasture within the enclosure, and the presence of other horses feeding there, would allure horses on the highway to enter it, rendered such a fence almost certain to injure passing animals. This fact, considered in conjunction with the other facts to which we have especially directed attention, brings the case fully within the reasoning of the court in *Durham* v. *Musselman*, 2 Blackf. 96 (18 Am. Dec. 133), and directly within the decision in *Young* v. *Harvey*, 16 Ind. 314.

In the former case it was said: "If the injury is the natural

or probable consequence of the act, and such as any prudent man must have foreseen, it is but reasonable that the perpetrator of the act should be held accountable for the injurious consequences. As, in the case of a man baiting his trap with flesh so near the highway, or the grounds of another, that dogs passing the highway, or kept in another's grounds, are attracted into his traps, and thereby injured, he is liable for the injury. *Townsend* v. *Wathen*, 9 East, 277. In the second place, when the injury is accidental, the liability of the actor must depend on the degree of probability there was that such an event would be produced by the act."

In *Young* v. *Harvey*, *supra*, the horse of the plaintiff, wandering upon the streets and commons of a suburb of the city of Indianapolis, fell into an old well on the lot of the defendant, and it was held that an action would lie. This decision is strongly approved by a writer of excellent standing. 1 Thompson Neg. 300. The case has been approved in many subsequent cases. *Graves* v. *Thomas*, 95 Ind. 361; *Smith* v. *Thomas*, 23 Ind. 69; *Indianapolis, etc., R. R. Co.* v. *Wright*, 22 Ind. 376; *Howe* v. *Young*, 16 Ind. 312.

In *Jones* v. *Nichols*, 46 Ark. 207 (55 Am. R. 575), the defendant left open an unguarded excavation some distance from the highway, and the plaintiff's cow, which had been turned out upon the commons, fell into the excavation, and it was held that the action would lie.

Our ultimate conclusion is, that the facts stated in the complaint at least make a *prima facie* case, and that it is strong enough to drive the defendant to answer.

Judgment reversed.

Filed Dec. 6, 1887.

No. 12,949.

Barnes v. Shoemaker.

Sale.—*Merchandise.*—*Order Given to One and Filled by Another.*—Where goods ordered of one person are supplied by another, the appropriation thereof by the purchaser, after notice that they are so supplied, makes him liable, as he thereby ratifies the transaction, and the ratification relates back and gives the order the same effect as if it had been originally given to the person filling it.

From the Monroe Circuit Court.

J. H. Louden and *R. W. Miers*, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellee.

Mitchell, C. J.—Barnes sued Shoemaker to recover a balance alleged to be due on an account for goods sold and delivered.

It appears from the evidence that Shoemaker had formerly been a retail book and stationery dealer in Bloomington, Indiana, and that he had been accustomed to deal with C. O. Perry, a jobber of books in Chicago, Illinois. Prior to the 23d day of September, 1882, Perry and Shoemaker had a transaction which resulted in the former becoming debtor to the latter in the sum of $50.76 for books which Shoemaker sold to Perry. Other books were turned over by Shoemaker to Perry, which the latter agreed to sell on commission. It was estimated that the books turned over to be sold on commission were worth $61.50, and Perry receipted to Shoemaker for the whole, amounting to $102.26, which sum was to be accounted for in books to be furnished by Perry upon the order of Shoemaker. On September 23d, 1882, the defendant, Shoemaker, sent a written order to Perry requesting him to send him by express a list of school books. The latter, having in the meantime gone out of the school book trade, took the order to the plaintiff, Barnes, and requested him to fill it, at the usual discount to the trade, and to

charge $50.76 of the amount to Perry's account. Barnes sent the books thus ordered to Shoemaker by express, explaining in a letter how the order came to be filled by him, and inclosing with the letter an invoice or statement substantially as follows:

"CHICAGO, Sept. 23d, 1882.

"*Mr. J. W. Shoemaker, Bloomington, Ind.:*

"Bought of C. M. Barnes, wholesale dealer in school and miscellaneous books, stationery, etc., 151 and 153 Wabash avenue.

"Terms, 30 days less 2 per cent.

10 " " 3 " "

"Payable in Chicago with exchange.

"All claims for allowances should be made within ten days from receipt of goods."

Following the above was an itemized account aggregating $116.72, from which was deducted $50.76 charged to Perry, leaving a balance of $65.96 due Barnes as shown upon the invoice.

The defendant received and accepted the books, and also received the letter and statement, but says he paid no attention to them, supposing the statement and books to have been forwarded by Perry. Subsequently the appellant sent duplicate statements of his account to the defendant, who refused payment on the ground that the order had been sent to Perry, and that the latter was indebted to him on account of previous transactions in a sum amounting to $102.26 instead of $50.76, the amount credited on the plaintiff's invoice.

There was a verdict and judgment for the defendant.

An attentive examination of the evidence fails to disclose any theory upon which the judgment can be sustained. It may be conceded that if the appellant, Barnes, had filled the order without at the same time giving notice that the order was filled by him and not by Perry, to whom it was sent, there could have been no recovery, even though the defendant re-

ceived and appropriated the goods. In that event one of the indispensable elements of a contract, the mutual assent of contracting parties, would have been absent. To support a recovery for goods sold and delivered, there must have been a contract, either express or implied, between the person that ordered and the one who supplied the goods. Where goods ordered of one person are supplied by another, the acceptance and use of the goods without notice that they have been so supplied will not create that privity of contract between the person ordering the goods and the one who thus supplies them, which is essential to support an implied assumpsit. *Hills* v. *Snell*, 104 Mass. 173 (6 Am. R. 216); *Boston Ice Co.* v. *Potter*, 123 Mass. 28 (25 Am. R. 9); *Boulton* v. *Jones*, 2 H. & N. 564.

The right of a party to select his own patrons, or to determine with whom he will deal, can not be frustrated by a mere interloper, who fills an order never sent to nor intended for him, without the knowledge or consent of the person to whom the goods are supplied.

It is not essential, however, that notice be given before the goods are delivered. If the person ordering the goods receives notice before the goods are appropriated or converted that they have been furnished by another, and is also notified that they are furnished upon such terms as import that the person supplying the goods contemplated a sale upon terms stated, and the person who sent the order afterward receives and appropriates them, he thereby assents to and ratifies the filling of the order, and such assent and ratification relate back and give the order the same effect as if it had been originally given to the person who filled it. *Orcutt* v. *Nelson*, 1 Gray, 536; *Mudge* v. *Oliver*, 1 Allen, 74; *Wellauer* v. *Fellows*, 48 Wis. 105.

The appellant testified that he sent a letter enclosing an invoice of the goods, which stated upon its face the terms upon which they were furnished and the credit given on account of the transaction with Perry. He also testified that

he explained in the letter in which the invoice was enclosed the circumstances under which he filled the order. The appellee admits that he received the invoice at or about the time he received the goods. He does not deny that he received the letter. It is not enough that through his inattention, induced by the fact that he sent the order to Perry, he failed to observe what was patent upon the face of the letter and invoice, nor does it make any difference that the letter and invoice were received by his clerk or agent, and not by himself.

The appellee can not impose the consequences of his negligence, or that of his agent, upon the appellant, who exercised all the caution that was reasonably possible under the circumstances. The appellant having filled the order in good faith, and having given notice, which the appellee received before he appropriated the goods, the latter can not now throw the loss, which could have happened only through his inattention, on the appellant.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

Filed Dec. 7, 1887.

112	515
114	497
115	511
116	362
116	599
121	392
122	438
112	515
126	540
127	201
112	515
129	147
112	515
130	520
112	515
134	[illegible]
112	515
140	161

No. 12,872.

Kleyla et al. v. Haskett et al.

Judgment.—*Irregularities.—Collateral Attack.*—Mere irregularities are not available in a collateral attack upon a judgment.

Same.—*Drainage Proceeding.—Notice.—Sufficiency.*—Where there was some notice in a drainage proceeding, although defective, a collateral attack upon the judgment can not be maintained.

SAME.—*Pleading.—Conclusions.*—An allegation in a complaint to set aside a judgment that "no notice was given as required by law" is a conclusion, as the sufficiency of the notice is a question for the court.

From the Clinton Circuit Court.

J. Jones, for appellants.

J. N. Waugh and *J. P. Kemp*, for appellees.

ELLIOTT, J.—The appellants' complaint seeks to set aside a judgment rendered by the Tipton Circuit Court in a drainage case.

Several irregularities are pointed out in the proceedings of the court, but these irregularities are not available in this collateral attack. It is too well settled to require the citation of authorities, that mere irregularities can not be taken advantage of in a collateral attack upon the judgment of a court of competent jurisdiction.

If the appellants' complaint showed that the court had no jurisdiction of the cause in which the judgment was rendered it would undoubtedly be good, but this is not shown. The allegations bearing on this point are these: "On the 7th day of February, 1882, a pretended affidavit was presented to the court stating that notice had been given of the intention to file said petition, but in truth and in fact no notice of any kind was ever given as required by law of the intention to file said petition, and that no sufficient affidavit was ever filed in said court showing that notice had been given as required by law." These allegations are plainly insufficient. They are the mere conclusions of the pleader; for whether notices are or are not sufficient, or are not such as are required by law, is a question to be decided by the court, and not by the pleader. *Singer, etc., Co.* v. *Effinger*, 79 Ind. 264.

The vice in these allegations is that of a negative pregnant, for they admit there was some notice, but deny that it was sufficient in law. If there was some notice, and the court adjudged it sufficient, the judgment can not be col-

laterally attacked, although the notice was defective. *Muncey* v. *Joest*, 74 Ind. 409; *McAlpine* v. *Sweetser*, 76 Ind. 78; *Hume* v. *Conduitt*, 76 Ind. 598; *Stout* v. *Woods*, 79 Ind. 108; *Cavanaugh* v. *Smith*, 84 Ind. 380; *Quarl* v. *Abbett*, 102 Ind. 233; *Jackson* v. *State, etc.*, 104 Ind. 516, and authorities cited; *McMullen* v. *State, ex rel.*, 105 Ind. 334; *Pickering* v. *State, etc.*, 106 Ind. 228.

The allegations are insufficient, because they tacitly concede that the record shows that notice was given, and, where this appears, the general rule is that a collateral attack can not prevail. *Baltimore, etc., R. R. Co.* v. *North*, 103 Ind. 486.

The law in force at the time the petition was filed, January 13th, 1882, did not require that notice of the time of filing the petition should be given, but that notice of the "intention to present the petition" should be given. R. S. 1881, sections 4275, 4284.

Judgment affirmed.

Filed Dec. 9, 1887.

112	517
115	465
116	157
190	42
112	517
125	450
112	517
140	375
112	517
151	407
112	517
156	379
112	517
159	388

No. 13,884.

Conner et al. v. The Town of Marion.

Practice.—*Finding of Facts.—When Regarded as a General Finding.*—A finding made by the court upon the trial of a cause, no matter how full it may be, will be regarded on appeal as a general finding, unless the record shows that it was made in writing, at the request of one or both of the parties, and signed by the judge.

Same.—*Reserved Questions of Law.—Causes for New Trial.*—Alleged errors occurring at the trial must be made grounds of a motion for a new trial, and this rule applies as well to questions of law reserved under section 630, R. S. 1881, as to questions reserved under the general rules of practice authorized by the code.

SAME.—*Questions Arising on Evidence.—Bill of Exceptions.*—Where, under section 630, R. S. 1881, the reserved question of law arises on evidence admitted at the trial, all the evidence which has any bearing upon the reserved question must be made part of the record by the bill of exceptions, to enable the Supreme Court to apprehend the particular question involved.

From the Grant Circuit Court.

J. A. Kersey, L. D. Baldwin and *C. L. Ratliff*, for appellants.

J. L. Custer, for appellee.

HOWK, J.—This was a suit by the incorporated town of Marion, as plaintiff, against the appellants, Sarah Conner and others, as defendants. In its complaint the town of Marion alleged that it was the owner and entitled to the possession of certain real estate, particularly described, in Grant county, in this State, and containing two acres; and that appellants claimed title to such real estate adversely to appellee, etc. Wherefore the town of Marion asked that its title to such real estate might be quieted, etc.

It is recited that four of the defendants, naming them, appeared and "separately answered the general denial, all the rest of said defendants being defaulted;" but no such answer appears in the record. Afterwards, on December 10th, 1886, three of the defendants filed what is called their cross-complaint against their co-defendants, and demanded that partition be made between them and their co-defendants of the real estate in controversy. Then there follows in the record what purports to be a copy of a deed executed by Martin Boots and Nancy, his wife, conveying to the board of commissioners of Grant county, and their successors in office, "for the use of a burying-ground for the citizens of Marion and vicinity, of the county of Grant," the same real estate described in plaintiff's complaint herein, and dated August 17th, 1839. The record then recites that the town of Marion and another "answered the general denial" to the cross-complaint, "and

the rest of the defendants thereto answered by confessions of its allegations." This is followed in the record by a writing, which is not signed or authenticated by any one, but it is described in the "marginal notes" of appellants' counsel as a "statement of the court." Immediately following this in the record is appellants' motion for a new trial, which was overruled, but no exception was saved to such ruling; and then followed the final judgment and decree of the court quieting the title of the town of Marion in and to the real estate in controversy, as prayed for in its complaint.

Upon the record of this cause, as thus made, seven errors have been assigned by the appellants. Three of these errors seem to have been assigned upon the theory that what is called, in the marginal notes upon the record, a "statement of the court," was in substance and might be regarded as a special finding of facts, under the provisions of section 551, R. S. 1881, which provides that, if one of the parties request it, "the court shall first state the facts in writing, and then the conclusions of law upon them." Each of the first three errors assigned begins as follows: "The court erred in its conclusion of law," etc. It is very clear, however, under our decisions, that what is called a "statement of the court," in the marginal notes, can not be regarded here as the trial court's special finding of the facts and its conclusions of law thereon, under the provisions of section 551, *supra*. Thus, we have often held that the finding of the court, upon the trial or hearing of a cause, no matter how full or extended it may be, will always be regarded here as a general finding, unless it be shown by the record that the finding was made in writing, at the request of one or both of the parties, and signed by the trial judge. *Caress* v. *Foster*, 62 Ind. 145; *Smith* v. *Tatman*, 71 Ind. 171; *Bake* v. *Smiley*, 84 Ind. 212.

There can be no doubt, we think, that appellants intended, in preparing the record of this cause, to reserve a "question of law decided by the court during the progress of the cause,

for the decision of the Supreme Court," under the provisions of section 630, R. S. 1881. This section of the statute is substantially, if not literally, a re-enactment of section 347 of the civil code of 1852. 2 R. S. 1876, p. 177. The so-called "statement of the court," which, as we have seen, was not signed by the judge nor authenticated in any manner, concluded as follows: "The court in deciding said cause ruled that the deed from said Martin Boots to said board of commissioners conveyed an absolute indefeasible fee simple estate, without possibility of reverter in said Martin Boots, or his heirs, the condition having been satisfied by the use of the land for a burying-ground for thirty years."

It is vigorously contended by appellee's counsel, that the question of law decided by the court below, which appellants attempted to reserve for the decision of the Supreme Court, is not so saved in and presented by the record of this cause as that, under the law, such question can be considered and decided here. This contention of counsel is founded in part, at least, upon the fact we have already noticed, in our statement of this case, that appellants saved no exception to the overruling of their motion for a new trial. In response to this contention, it is claimed by appellants' counsel that, in such a case as the one at bar, no motion for a new trial was necessary for the purpose of presenting a reserved question of law for the decision of this court. Upon this point this court has repeatedly held that, when the reserved question of law arises on the trial of the cause, a motion for a new trial is always necessary. *Garver* v. *Daubenspeck*, 22 Ind. 238; *Love* v. *Carpenter*, 30 Ind. 284; *Starner* v. *State, ex rel.*, 61 Ind. 360; *Rousseau* v. *Corey*, 62 Ind. 250.

In *Starner* v. *State, ex rel., supra*, the court said: "The rule is a general one, that, where an alleged error, occurring at the trial, is not made the ground of a motion for a new trial, it will not be considered on appeal to this court, and this rule, in our estimation, applies as well to questions of

law reserved upon the trial, under section 347, *supra*, (section 630, R. S. 1881), as to questions reserved upon the trial under the general rules of practice authorized by the code."

We can not overrule or depart from the rule of practice declared in the cases cited. The rule has been recognized and acted upon by this court for many years; and where, as here, the point has been made and insisted upon, we have not found that any other or different rule of practice has been laid down or recognized in any of our decisions when the reserved question of law for decision here was attempted to be reserved on matters occurring at the trial.

It is also contended by appellee's counsel, that the question of law attempted to be reserved by the appellants is not properly presented for the decision of this court, because no bill of exceptions was filed containing the evidence introduced on the trial in relation to such question of law. This point is well taken, we think, and must be sustained. Giving the record of this cause the most liberal construction, it can not be correctly said, as it seems to us, that even the deed from Martin Boots to the board of commissioners, which the court below construed adversely to the claims of appellants herein, and which they ask us to construe on this appeal, was made a part of such record by a bill of exceptions, or in any other manner known to our law. Under section 630, *supra*, when a reserved question of law is taken to the Supreme Court upon a bill of exceptions, it is necessary that the bill be so made "that it will distinctly and briefly embrace so much of the record of the cause only and the statement of the court, as will enable the Supreme Court to apprehend the particular question involved." Where, as in this case, the reserved question of law arises on evidence offered and admitted on the trial, we are of opinion that all the evidence so admitted, which has any bearing upon the reserved question of law, must be made part of the record of the cause by the bill of exceptions, to enable this court to

apprehend the particular question involved. *Miller* v. *Seligman*, 58 Ind. 460.

The reserved question of law which we are asked to consider and decide, we think, is not properly presented for our decision by the record of this cause.

The judgment is affirmed, with costs.

Filed Dec. 10, 1887.

No. 12,967.

COTTINGHAM v. THE FORTVILLE AND NOBLESVILLE TURNPIKE COMPANY.

TRESPASS.—*Drainage Commissioner.—Personal Liability.—Void Judgment.—Turnpike Company.*—A drainage commissioner who constructs an open ditch across a turnpike, assuming to act under proceedings to which the turnpike company was not a party, is a trespasser, and personally liable, the judgment being void as to the company, and affording the officer no protection.

From the Hamilton Circuit Court.

W. S. Christian and *I. W. Christian*, for appellant.

T. J. Kane and *T. P. Davis*, for appellee.

ELLIOTT, J.—The appellee charges that the appellant unlawfully and without right tore up its turnpike and constructed an open ditch across it ten feet in depth and fifteen feet in width. The answer of the appellant attempts to justify by pleading a judgment ordering the opening of the ditch, and by averring that the ditch constituted part of the line of a ditch ordered to be opened and constructed by the appellant as a commissioner of drainage.

It is contended by the appellant's counsel that, by force of section four of the drainage law of 1883, there is no personal liability on the part of the appellant, but that he is liable only in his capacity as drainage commissioner. The appellant was a trespasser, for the appellee was not bound by the judgment in the drainage proceedings, as it was not a party to those proceedings. Doubtless, if the appellee had been a party to those proceedings, then the appellant would be protected, although there were errors or irregularities in the proceedings; but here there was no jurisdiction of the person of the appellee, and without jurisdiction the judgment is void.

A void judgment will not protect an officer. *Rutherford* v. *Davis*, 95 Ind. 245. An officer is liable as an individual where he commits a trespass. He can not defeat one who sues him by alleging that he acted in an official capacity, unless there is some legal process giving at least color of rightful authority to his acts.

Judgment affirmed.

Filed Dec. 10, 1887.

No. 12,935.

ALLEN v. BOND, TRUSTEE.

112	[illegible]
117	371
119	430
112	523
130	529
112	[illegible]
134	114
112	523
148	550
112	523
165	157
112	523
f171	102

NEW TRIAL.—*Newly Discovered Evidence.—Diligence.*—A new trial will not be granted on the ground of newly discovered evidence where, by the use of reasonable diligence, such evidence might have been obtained and used at the trial.

SAME.—*Facts Constituting Diligence Must be Set Out.*—Mere allegations of due diligence in endeavoring to obtain evidence in the first instance is not enough, but the facts constituting the diligence used must be stated, so the court may determine whether it was sufficient.

SAME.—*Absent Witness.—Efforts to Procure Testimony of.*—Where a party is denying the validity of a marriage alleged to have been performed by a named minister, in a certain city, at a specified time, and knows before the trial that the testimony of such minister is important, he can not, after the term, obtain a new trial on the ground of newly discovered evidence, unless he excludes negligence on his part in ascertaining the whereabouts of the minister, shows that he moved promptly to obtain his testimony, and that he could not, by the exercise of reasonable diligence, procure the same at the trial.

From the Vanderburgh Circuit Court.

W. M. Blakey, W. S. Hurst, A. Gilchrist and *C. A. DeBruler*, for appellant.

T. E. Garvin, G. A. Cunningham, A. Iglehart, J. E. Iglehart and *E. Taylor*, for appellee.

NIBLACK, J.—On the 1st day of November, 1875, Francis D. Allen, of the city of Evansville, obtained a loan of seven thousand five hundred dollars from the Equitable Trust Company of New York, and to secure the payment of that sum, with semi-annual instalments of interest, he, on that day, executed to Jonathan Edwards, as trustee for that company, a mortgage on a tract of land in Vanderburgh county. Edwards afterwards died and Henry R. Bond became his successor in the trust.

At the time of the execution of the mortgage, Allen claimed to be, and was generally reputed and understood to be, an unmarried man. Allen having made default in some of the conditions of the mortgage, Bond, on the 5th day of December, 1883, commenced proceedings in foreclosure against him in the Vanderburgh Circuit Court; also, making certain corporations and other persons defendants to answer as to any interest they might respectively claim to have in the mortgaged lands.

The complaint also charged that Mary E. Allen, the appellant in this proceeding, and otherwise known as Mary Effinger, claimed to be the wife of the defendant, Francis D. Allen, and that, whatever the merits of her claim might

then be, she was not his wife when he executed the mortgage then sought to be foreclosed. She was also made a defendant to answer as to her interest, if any, in the lands described in the mortgage. All the defendants, except the appellant and Francis D. Allen, made default.

The appellant answered that, early in the month of May, in the year 1875, she was united in marriage with her co-defendant, Francis D. Allen, in the city of St. Louis, in the State of Missouri; that she thereby became the lawful wife of her said co-defendant, which she had ever since continued to be, as she then was; that she was, consequently, the wife of the said Francis D. Allen at the time he executed the mortgage in suit, but did not join in the execution of that instrument; that, by virtue of her marital rights, she had an interest in the mortgaged lands, which she prayed might be protected. To this there was a reply in denial.

Issue being also joined between the plaintiff and Francis D. Allen, the court heard the evidence, and made a finding against the latter for a specified sum as due under the mortgage, and rendered a personal judgment and decree of foreclosure accordingly.

As between the plaintiff and Mrs. Allen, the finding and judgment were in her favor, and there was no finding or judgment against any of the other defendants. These final judgments were rendered on the 9th day of June, 1884.

Mrs. Allen was a witness in her own behalf at the trial of the cause. She stated that she had become acquainted with Francis D. Allen two or three years prior to 1875, having been first in his service in domestic employment; that, in the meantime, illicit relations between them had intervened; that, in consequence, she had, in March, 1875, commenced a prosecution against him; that soon after this he proposed that, if she would dismiss her prosecution, he would take her away to some suitable place and marry her privately, to which she consented; that accordingly she, at his request, accompanied him to the city of St. Louis early in May of

that year, where they were married by a German minister of the gospel by the name of Roos at his residence, near a church; that the minister thereupon gave her a marriage certificate, which she brought home with her, and which she, three or four years later, showed to several persons, naming each of them; that this certificate had since been either lost or mislaid; that she and the said Francis D. Allen had ever since lived together as husband and wife, and still continued to do so, and that she had in the meantime borne to him several children.

The other persons named by Mrs. Allen, as above, testified that she had shown them a paper as stated by her; that they thought it contained the names of her and Francis D. Allen, and was partly in print and the rest in writing, with a fancy border around it, but none of them could repeat the substance of it, or recall the exact, if any, date, or remember by whom it was signed. Two of them, at least, indulged the impression that it had something to say about a marriage between the persons named in it, and all agreed that the reading of the paper had the effect of satisfying them that Mrs. Allen and Francis D. Allen had been at some time lawfully married.

Francis D. Allen was also a witness in the cause. He corroborated Mrs. Allen in every essential particular, and went more into detail as to the circumstances attending their marriage, and as to the precise place at which it occurred. He also stated that on account of his children by a former marriage, and the circumstances attending it, he desired that his marriage with his co-defendant should, as far as possible, be kept secret, and that it was so agreed between them; that he went to Missouri to be married because no license was there required; that at the time of the marriage, and for some time previously, as well as subsequently, he kept a hotel in the city of Evansville, and that his wife, then Mary Effinger, was in his employment as a hired woman, and resided on a farm, in the country, belonging to him; that for some

time—perhaps two years thereafter—the same ostensible relations were continued, but that actual marital relations were, during that time, observed in their business and domestic affairs, and that since about 1877 or 1878 they had lived together as husband and wife under the same roof.

In regard to the cohabitation testified to, both Mrs. Allen and Francis D. Allen were corroborated by several persons living near to them.

In rebuttal it was shown that the defendants, who had thus testified, were not generally reputed to be husband and wife until some time after the year 1875, and that they did not hold themselves out as such for a considerable time after that year, and that there had always been some doubt as to the exact relations which had existed between them; that by a statute of the State of Missouri every minister celebrating marriages was required to keep a register of the persons united in marriage by him, and at, or within, stated times to report a list of the persons so united in marriage to the recorder of the proper county, to be by the latter recorded in his office.

The deposition of one Thiele, taken in St. Louis in March, 1884, after Mrs. Allen's answer was filed early that month, was also read in evidence in rebuttal. He deposed that he was a minister of the gospel and pastor of St. Peter's German Evangelical church at St. Louis; that in that position he was the successor of Ernest Roos, who had been pastor of that church from December 1st, 1870, until some time in 1880; that Roos had kept what purported to be a register of all the marriages celebrated by him during that period of time, which was then in his, Thiele's, possession; that the name of Francis D. Allen or that of Mary Effinger did not appear on that register, and that hence there was no mention there of a marriage between those persons. The witness submitted with his deposition a transcript of so much of that register as embraced the month of May, 1875, which did not have upon it either the name of Francis D. Allen or Mary Effinger. The same witness

described the house in which Roos lived during most, if not all, the time he was pastor of the church named. His description corresponded in a general way to that given by Mrs. Allen and Francis D. Allen of the house in which they claimed to have been married. Thiele further stated that, so far as he knew, Roos then resided in Switzerland.

One of the plaintiff's attorneys also testified to having visited St. Louis and examined the marriage record in the recorder's office of the county in which that city is situate for the year 1875, and for several years both previous and subsequent to that year, and to his failure to find there any record of a marriage between Mrs. Allen and Francis D. Allen, or any reference to either one of those persons.

On the 28th day of November, 1884, which was some time after the close of the term at which the proceedings herein above set forth had terminated, the appellee, Bond, filed the complaint now before us against Mrs. Allen for the purpose of obtaining a new trial as against her in the suit for a foreclosure of the mortgage, upon the ground of newly discovered evidence.

The complaint, after setting out at length the proceedings referred to as above, averred that, prior to the trial of the cause, the plaintiff diligently searched and inquired for evidence of the marriage alleged by Mrs. Allen in her answer; that to that end one of the plaintiff's attorneys went to the city of St. Louis and made diligent and careful search for Rev. Ernest Roos, the minister by whom Mrs. Allen and Francis D. Allen alleged they had been married; that such attorney succeeded in finding the place and church at which it was claimed the marriage ceremony had taken place, and also the record of marriages kept by said Roos at the time of the alleged marriage, but that he was unable to find Roos or to learn where he was, except that he was supposed to be in Switzerland, on the continent of Europe; that, at the time his said attorney went to St. Louis, the plaintiff was wholly ignorant as to what he could prove by Roos, or as to what

Roos would testify to in relation to the alleged marriage; that, had he known what could be proven by Roos in the respect stated, his evidence could not have been obtained in time for the trial; that, after the close of the term at which the trial was had, that is to say, about the 15th day of September, 1884, the plaintiff discovered that he could prove by Roos that during the month of May, 1875, and for several years before as well as after that month, he was pastor of the church in St. Louis near which the alleged marriage between Mrs. Allen and Francis D. Allen was said to have occurred; that, during all the years of his pastorate, he kept a register of marriages in said church as the law of Missouri then required; that he kept such register with conscientious correctness by recording in it every marriage solemnized by him while connected with that church, including said month of May, 1875; that the transcript of such register for said month of May, submitted by Rev. Mr. Thiele, contained a full, true and complete list of all the marriages solemnized by him during that month; that no marriage ceremony between Francis D. Allen and Mary Effinger, to the best of his knowledge and recollection, was ever performed by him; that he never, at the request of the said Francis D. Allen, or in pursuance of any agreement or understanding, failed to enter any marriage solemnized by him in his register of marriages, and that a register of all the marriages in which he performed the marriage ceremony while pastor of the church in question was by him returned to the recorder of the proper county. The affidavit of Roos, swearing substantially as it was alleged he would, was filed with and accompanied the complaint.

After overruling a demurrer to the complaint, and upon issue joined and a hearing upon the matters charged, the court below set aside the finding and judgment made and entered as between the plaintiff and Mrs. Allen in the original

cause, and granted a new trial upon the issue formed between those parties at the former trial.

As appellant, Mrs. Allen assigns error only upon the overruling of her demurrer to the complaint.

It is a familiar rule of practice, as applicable to all classes of cases, that a new trial will never be granted on account of newly discovered evidence where, by the use of reasonable diligence, the newly discovered evidence might have been obtained and used at the trial sought to be vacated. *Cook* v. *Hare*, 49 Ind. 268; *Bowman* v. *Clemmer*, 50 Ind. 10; *Nordman* v. *Stough*, 50 Ind. 280; *Carver* v. *Compton*, 51 Ind. 451; *Fort Wayne, etc., R. R. Co.* v. *Fhalor*, 51 Ind. 485; *Kochel* v. *Bartlett*, 88 Ind. 237; *Hines* v. *Driver*, 100 Ind. 315.

It is also a well established if not an equally familiar rule, that mere allegations of *due diligence* in endeavoring to obtain evidence in the first instance will not suffice.

The facts constituting the diligence used must be stated. The test is, what did the party do in his first effort to procure the evidence he claims to have discovered since the trial? When this is alleged, it then becomes a question for the court to determine whether due diligence was exercised.

As constituting diligence in this case, it is charged that one of the plaintiff's attorneys went to St. Louis and made diligent and careful search for Roos; that the attorney succeeded in finding the place and the church at which the marriage was claimed to have taken place; also, in finding the record of marriages kept by Roos at the time of the supposed marriage as indicated by Mrs. Allen's answer, but that he was unable to find Roos, or to ascertain where he was, except that he was supposed to be in Switzerland. The time at which the attorney so went to St. Louis is not given, but the evidence set out in the complaint, and which is thus made a part of that pleading, shows that one of the plaintiff's attorneys took the deposition of Thiele in that city on the 25th day of March, 1884, near two months and a half before the

cause was tried, and from the nature of that deposition the inference ought to be that the visit in question was made before that time. If nothing to that effect had already occurred, the information imparted by the deposition of Thiele was sufficient to put the plaintiff on his inquiry as to where and how Roos might be found. The issue tendered by Mrs. Allen's answer was a sufficient indication as to Roos' probable importance as a witness, and this was very much strengthened by the discovery that his register of marriages contained no record of the marriage in controversy. Under such circumstances, ignorance of what Roos might know on the subject involved afforded no excuse for delay in an effort to ascertain what could be proven by him. The reasonable inference would seem to be, that, where a minister has had charge of a congregation for near ten years, he leaves many acquaintances, if not friends, behind him when he betakes himself to other fields of labor, and that inquiry of the members of his late congregation, or others of his acquaintances in the same locality, would supply the readiest means as to where he probably might thereafter be found. It is not stated that there was any difficulty in getting into communication with Roos after the trial, and nothing is shown indicating that he might not have been as easily communicated with before that event. If necessary, additional time would doubtless have been given within which to procure the testimony of a witness presumably so important.

Then, again, it is not averred that it was *first* discovered what Roos would testify to on or about the 15th day of September, 1884. It is the rule, in cases of this kind, that the party seeking relief must move promptly after the newly discovered evidence comes to his knowledge. *McDaniel* v. *Graves*, 12 Ind. 465.

For these reasons, the complaint does not, as we believe, exclude every conclusion of negligence on the part of the plaintiff, in his endeavor to obtain the testimony of Roos at the trial, to the extent that is required in an application for

a new trial on account of newly discovered evidence, and particularly so in an application made after the close of the term. To authorize the granting of a new trial for newly discovered evidence, there must be a strong affirmative showing in support of the application. *Swift* v. *Wakeman*, 9 Ind. 552; *Hines* v. *Driver*, *supra*.

Having reached the conclusion that the complaint is defective in one material respect, it follows that the judgment below ought to be reversed without reference to other questions urged against the sufficiency of that pleading. But it is, perhaps, not inappropriate to remark that, with one exception, all the material matters proposed to be proven by Roos are of a merely cumulative character. That exception is that he, to the best of his knowledge and recollection, never united Mrs. Allen and Francis D. Allen in marriage, which involves an entirely negative proposition. As applicable to evidence tending only to prove a negation, it must be borne in mind that generally a witness who testifies to an affirmative is entitled to credit in preference to one who swears to a negative, because the latter may have forgotten what actually occurred, while it is impossible to remember what never had an existence. 1 Greenleaf Ev., section 74, and note; *Stitt* v. *Huidekopers*, 17 Wall. 384; Shearman & R. Neg., section 481.

Neither Mrs. Allen nor Francis D. Allen testified that Roos was either requested or that he agreed to keep their alleged marriage as a secret or from being registered.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed Dec. 20, 1887.

No. 12,970.

THE BALTIMORE AND OHIO AND CHICAGO RAILWAY COMPANY v. EVARTS.

112	533
116	197
112	533
124	514
112	533
148	274
112	533
162	542

EVIDENCE.—*Withdrawn Paragraph of Complaint.—Introduction by Defendant.*—A paragraph of complaint which has been withdrawn by a dismissal may be introduced in evidence by the defendant.

SAME.—*Admissions.—Material Error.*—Where the paragraph withdrawn tends, by way of admissions, to prove that the plaintiff's theory, as ultimately relied upon for a recovery, is unsound, its exclusion from the jury is a material error.

From the LaPorte Circuit Court.

D. J. Wile, F. E. Osborn, H. Newbegin and *B. B. Kingsbury*, for appellant.

F. Church and *J. F. Church*, for appellee.

ELLIOTT, J.—The complaint of the appellee as originally filed was in two paragraphs, both seeking a recovery for a mare and colt killed by a locomotive of the appellant.

The second paragraph of the complaint was withdrawn by a dismissal, and after this had been done the appellant unsuccessfully offered it in evidence. We think the pleading was admissible.

In *Boots* v. *Canine*, 94 Ind. 408, the question was fully discussed and many authorities cited. It was there held that a pleading like that before us should be received in evidence. We do not deem it necessary to again discuss the question, but content ourselves with adding to the authorities collected in *Boots* v. *Canine*, *supra*, the following authorities, which fully sustain our ruling: *Gordon* v. *Parmelee*, 2 Allen, 212; *Bliss* v. *Nichols*, 12 Allen, 443; *Fogg* v. *Edwards*, 20 Hun, 90; *Frearson* v. *Loe*, L. R. 9 Chan. Div. 48 (25 Moak Eng. Rep. 747, 763).

Appellee's counsel do not controvert the position of appellant upon the legal proposition, but endeavor to avoid it by

asserting that the exclusion of the evidence was a harmless error. In this they are not successful.

In *Harbor* v. *Morgan*, 4 Ind. 158, it was said: "When evidence is pertinent to the issue, it should be admitted, however little it may seemingly tend to prove." This doctrine has been approved in many cases. *Hall* v. *Henline*, 9 Ind. 256; *Nave* v. *Flack*, 90 Ind. 205 (46 Am. R. 205); *Boots* v. *Canine*, *supra*; *Lanman* v. *Crooker*, 97 Ind. 163; *Union, etc., Ins. Co.* v. *Buchanan*, 100 Ind. 63; *Grand Rapids, etc., R. R. Co.* v. *Diller*, 110 Ind. 223.

The second paragraph of the complaint did tend to prove that the appellee's theory, as ultimately relied upon for a recovery, was unsound. The second paragraph counted on the negligence of the appellant in running its locomotive on the mare while she was on a public crossing, whereas the first paragraph counted on the breach of the statutory duty to securely fence the track. It is obvious, therefore, that the second paragraph impliedly admits that the killing of the mare was not owing to the insecurity of the fences or cattle-guards, but to the negligence of the company in killing the mare while on the public crossing. This is an admission that the mare was not killed at a place where the appellant was bound to fence, and the appellant was entitled to the benefit of the admission. It is true that the pleading avers that the cattle-guard was insufficient, but this does not break the force of the admission that the mare was killed on a public crossing. If the mare was killed on the crossing, then, although there was an insufficient cattle-guard near it, the appellant would not be liable unless its employees were guilty of negligence in running upon the mare. Nor is this all. If the mare was killed on the crossing, contributory negligence on the part of the appellee would defeat a recovery; but if she was killed at a place where the appellant was bound to fence, and had not securely fenced, then contributory negligence would not defeat the action. It is apparent from

these considerations that the admissions of the second paragraph of the complaint were not unimportant.

The case is a close one upon the evidence, and it was a harmful error to deprive the appellant of any competent evidence.

The admission contained in the appellee's pleading was undoubtedly open to explanation. It was not in any sense conclusive, but it was, nevertheless, an admission. A party who makes an admission, either verbal or written, can not make it incompetent by withdrawing it, although the withdrawal may tend to weaken its force. While all admissions that are not conclusive may be shown to be founded on a mistake, or may be otherwise explained, they remain competent evidence to go to the jury for what they may be worth. In this instance the appellee had a right to show under what circumstances his pleading was written, and to explain or contradict it by any competent evidence, but he could not destroy its competency by a withdrawal.

As the case must be again tried, we do not deem it proper to discuss the questions presented on the evidence.

Judgment reversed.

Filed Dec. 7, 1887.

119 595
120 89
196 181

No. 13,670.

Nordyke & Marmon Company v. Gery et al.

Mortgage.—*Interest of Mortgagee in Insurance Effected by Mortgagor on Mortgaged Premises.*—A mortgagee, merely as such, has no interest, legal or equitable, in a policy of insurance effected by the mortgagor upon the mortgaged premises for his own benefit, in the absence of any covenant or contract requiring the latter to insure for the benefit of the former.

Nordyke & Marmon Company v. Gery *et al.*

SAME.—*Covenant.—Equitable Lien of Mortgagee.*—Where a mortgagor has covenanted that he will keep the mortgaged premises insured for the benefit of the mortgagee, and either has effected or thereafter effects insurance in his own name, though without the mortgagee's knowledge, and without intent to perform the agreement, such insurance will be treated as having been effected under the agreement, and the mortgagee will have an equitable lien thereon.

SAME.—*Performance by Mortgagor of Covenant to Insure.*—Where a mortgagor, who has covenanted to insure the mortgaged premises for the benefit of the mortgagee, has effected solvent insurance, in good faith, in the name and to the acceptance of the latter, to an amount adequate to secure the debt, and has kept the policies alive until loss occurs, he is not in default, and will be responsible thereafter only for such infirmities as existed in the insurance at the time the policies were accepted, or such as may have resulted from his own subsequent conduct.

From the Tippecanoe Superior Court.

H. W. Chase, F. S. Chase, F. W. Chase, A. P. Stanton and *J. E. Scott*, for appellant.

J. R. Coffroth, T. A. Stuart and *J. H. Adams*, for appellees.

MITCHELL, J.—This was a proceeding commenced in the Tippecanoe Superior Court by the Nordyke & Marmon Company to foreclose two mortgages executed by Gery, Hall & Co. to the plaintiff below.

The mortgages covered a tract of real estate, the chief value of which consisted in a roller-mill thereon erected, with the furniture and fixtures therein contained. They were given to secure debts amounting respectively to $2,399.80 and $376.83. Both of the mortgages contained stipulations therein written, similar in legal effect, by which the mortgagors covenanted to keep the mortgaged premises fully insured for the benefit of the mortgagee, as its interest might appear. The mortgagors had caused the property to be insured, in various fire insurance companies, to the amount of $7,500. Of the policies so taken out, two, one issued by the Louisiana Insurance Company, the other by the Monarch Insurance Company, each for $1,250, had been made payable to, and were delivered to, the mortgagee, as a compliance

with the covenant contained in the mortgage securing the debt of $2,399.80. No insurance was taken especially applicable to the other mortgage.

The mortgagee alleged that, since the issuance of the policies, the roller-mill, with all the combustible material appertaining to it, had been destroyed by fire, and that the Monarch Insurance Company had become wholly insolvent, so that the mortgaged premises, with the insurance policies delivered to the appellant, were wholly inadequate to secure its debt, which, with the accumulated interest, amounted to about $3,200. There was a prayer for the foreclosure of the mortgages, and that a lien might be declared and enforced against the fund, generally, arising from the insurance policies, for an injunction to prevent the appellees from assigning or collecting the money on the policies, and for the appointment of a receiver to collect the money, etc.

The court granted a temporary restraining order enjoining the defendants from making any disposition of the policies, or the money arising therefrom, until a day certain, and until the further order of the court. At the time fixed, the matter respecting the continuance of the restraining order in force, and the appointment of a receiver, was heard by the court upon affidavits presented by the parties respectively. Pending the hearing, $1,333 of the moneys arising from the policies had by agreement been paid into court. Of this sum the court found that $360 ought to be paid to the mortgagee to reimburse it for a reduction, or "scaling," of the policies held by it, which scaling resulted from the taking out of other policies of insurance by the mortgagors subsequent in date to those held by the appellant. It was further found that the sum of $396.82, the amount of the second mortgage debt, with the accumulated interest, should be paid out of this fund.

Thereupon the defendants entered of record their consent that the sums above mentioned should be paid. Upon this being done, the court dissolved the temporary restraining

order theretofore issued, refused to appoint a receiver, and released the residue of the fund in the hands of the clerk and ordered it to be paid to the defendants.

From the interlocutory order so made this appeal is prosecuted.

Since the order of the court rendered available to the appellant a sum sufficient to satisfy the debt secured by the second mortgage, the consideration of any question connected with that instrument can be of no practical moment.

It was a disputed question, but the court may have found from the evidence before it that the appellant accepted the policies delivered to and retained by it as a compliance with the covenant contained in the first mortgage. That being so, the propriety of the order made by the court, in denying the application for a receiver, and in ordering that the residue of the money in its custody be paid to the appellees, depends upon whether or not, after the acceptance of the policies, the appellant may nevertheless resort to the insurance taken out by the mortgagors for their own benefit, on account of the total or partial insolvency of one of the companies whose policy it retains. While the court may have deemed it unnecessary in any event that the expense of a receiver should be incurred, and its order in that regard may have been proper, however the rights of the parties may ultimately appear, it is nevertheless apparent that the court must have reached the conclusion that in no event supposable upon the facts exhibited would the appellant be entitled to the money remaining in the hands of the clerk. Hence the order that the money should be paid to the appellees.

On behalf of the appellant it is contended, with much force and plausibility, that the covenant to keep the property fully insured for the benefit of the mortgagee, as its interest might appear, operated to vest in the appellant a specific right to the policies taken out in its name and delivered to it, and also to confer upon it an equitable lien upon any subsequent insurance taken out by the mortgagors for their own benefit,

to an extent necessary to enable it to realize therefrom any deficiency which may result from the inadequacy of the insurance delivered to it from any cause.

It is abundantly settled that a mortgagee, merely as such, has no interest, either in law or equity, in a policy of insurance effected by the mortgagor upon the mortgaged premises for his own benefit, independent of any covenant or contract requiring the latter to insure for the benefit of the former. 1 Jones Mortg., section 401.

Between the insurer and the insured a policy of fire insurance is, as a general rule, purely a personal contract, by which the former agrees to indemnify the latter against any loss he may sustain by the destruction of his interest in the property insured.

It is settled beyond controversy, however, that the insured may, by an executed agreement, under which insurance is effected in the name of a third person who has an insurable interest in the property, invest such third person with the legal right to enforce payment of a policy taken out for his indemnity; or he may, by an executory agreement, give to such third person an equitable lien upon the money due upon a policy which the insured has taken out in his own name, but which, according to the agreement, should have been taken in the name of the other, or which should have been, by the like agreement, assigned to him. *Nichols* v. *Baxter*, 5 R. I. 491; *Doughty* v. *Van Horn*, 29 N. J. Eq. 90; *In re Sands Ale Brewing Co.*, 3 Bissell, 175; *Ames* v. *Richardson*, 29 Minn. 330; *Miller* v. *Aldrich*, 31 Mich. 408; *Cromwell* v. *Brooklyn Fire Ins. Co.*, 44 N. Y. 42; *Wheeler* v. *Insurance Co.*, 101 U. S. 439.

The foregoing and many other decisions settle the proposition that, in case a mortgagor has covenanted that he will keep the mortgaged premises insured for the benefit of the mortgagee, and either has effected or thereafter effects insurance in his own name, "though this be done without the mortgagee's knowledge, or without any intent to perform

the agreement, equity will treat the insurance as effected under the agreement (unless this has been fulfilled in some other way), and will give the mortgagee his equitable lien accordingly. This is upon the principle by which equity treats that as done which ought to have been done. That is to say, inasmuch as the insurance effected ought to have been made payable to the mortgagee, equity will give the mortgagee the same benefit from it as if it had been." *Ames* v. *Richardson, supra; Thomas* v. *Vonkapff*, 6 Gill & J. 372; *Carter* v. *Rockett*, 8 Paige, 437.

From what has preceded, the conclusion may be deduced that the right of a mortgagee to avail himself of the benefit of insurance taken out by the mortgagor depends wholly upon contract, and that his right to invoke the aid of a court of equity to enforce a lien upon money arising from unassigned policies effected by and in the name of the mortgagor depends entirely upon the existence of an unperformed executory agreement on the part of the mortgagor. When a contract has been fully and fairly executed according to its spirit and purpose, and to the acceptance of the party for whose benefit it was made, the consummation or performance of the contract leaves no room for the application of the equitable doctrine that equity treats that as done which ought to have been done. If a mortgagor, who has covenanted to insure the mortgaged premises for the benefit of the mortgagee, has effected solvent insurance, in good faith, in the name and to the acceptance of the mortgagee, to an amount adequate to secure the debt, then he has done that which he ought to have done; and if, in good faith, under the belief that he is affording the mortgagee valid indemnity, he keeps the policies so taken out alive until the mortgage debt is paid, or a loss occurs, he is not in default. This is according to the rule which declares, that "If a covenant be once properly performed, the covenantor shall be absolved from all liability, although the performance may by matter

subsequent be defeated or rendered unavailing." Platt Covenants, 140.

In such a case the mortgagor will have satisfied his covenant as completely as has a debtor who has paid his debt in compliance with his contract. He will be responsible thereafter only for such infirmities as existed and were inherent in the insurance at the time the policies were accepted, or such as may have resulted from his own subsequent conduct. "Though the covenantor performs the letter of his covenant, yet if he does any act to defeat its intent or use, he is guilty of a breach." Platt Covenants, 139.

In respect to insurance effected by the mortgagor for his own benefit, after and so long as the covenant to insure for the benefit of the mortgagee remains satisfied, the parties stand in the relation of mortgagor and mortgagee, between whom no contract to insure exists.

The application of what has been said to the case under consideration is this: the court may have found that the appellees purchased insurance, in the name and to the acceptance of the appellant, to an adequate amount, in companies which were solvent at the time, thereby fully complying with and satisfying the covenant contained in the mortgage. It may have found further, that they had in good faith complied with their contract, by continuing the policies thus accepted and held by the appellant, under the belief that they were affording their creditor available indemnity against loss by fire, and that they had done nothing since to impair or defeat the validity of the policies, except to take out subsequent insurance for their own protection, the effect of which was to scale the policies held and owned by the appellant, which scaling the court required them to make good. Upon the assumption that the foregoing may have appeared as the probable situation, the propriety of the orders made by the court is apparent. Whether the final hearing shall result in establishing what may have seemed probable at the pre-

liminary hearing remains to be determined by the court below when the evidence shall have been fully heard.

The orders and judgment of the court are affirmed, with costs.

Filed Oct. 19, 1887; petition for a rehearing overruled Dec. 10, 1887.

112	549
112	453
112	481
113	311
113	433
115	176
116	289
116	445
116	508
117	127
118	41
119	9
119	152
121	286
123	159
123	509
123	531
119	549
125	479
126	444
112	542
135	263
136	288
112	542
153	343
112	542
149	672
112	542
157	528
112	542
165	560
165	561
112	542
d166	134

No. 12,893.

THE CITY OF TERRE HAUTE v. HUDNUT ET AL.

MUNICIPAL CORPORATION.—*Sewer.—Negligence.*—A municipal corporation is liable for negligence in devising the plan of a sewer constructed by it, as well as for negligence in the manner of doing the work.

SAME.—*Skill Required in Plan for Sewer.*—Where the authorities of a municipal corporation undertake the work of constructing a sewer, or system of sewers, it is their duty to use reasonable care to procure the services of men skilled in such matters to prepare the plans for the same, and if there is a lack of such care, by reason of which the plans are defective, they are guilty of negligence, for which the corporation must answer in case of damage resulting from such defective plans.

SAME.—*When not Liable for Defective Sewer.*—Where, however, reasonable care is exercised by the municipal authorities in securing the employment of fair care and skill in the preparation of plans for a sewer, and ordinary care is used to see that such skill is brought into exercise, then there is no negligence, and can be no liability, although when the plan is carried into effect a defect may be developed which destroys or impairs its efficiency.

SAME.—*Evidence.—Reasonable Care.—Consultations With Experts.*—Where a recovery is sought for injuries caused by a defective sewer, or by a sewer of inadequate size, the defect or insufficiency being caused by a defect in the plan, it is competent for the municipal corporation to show that reasonable care was exercised in the employment of a competent engineer or expert to prepare the plan, and that ordinary care was used in seeing to it that he exercised skill, and, to this end, evidence of

consultation with experts, so employed, or of examination of plans by councilmen, is competent, though not in writing.

EVIDENCE.—*Weight of not Determined on Question of Admissibility.—Admissible if Tending to Support Theory.*—A court can not, on a question of the admissibility of evidence, determine its weight; but if there is any evidence tending to support the theory which makes the evidence competent, whether it be direct or indirect, the offered evidence must be admitted when presented in proper form.

SAME.—*Competent and Incompetent Must be Separated.*—Where, by a single question or proposition, evidence partly competent and partly incompetent is offered, there is no error in excluding it.

SAME.—*Expert Witness.—Qualifications of.*—No precise knowledge is required of an expert witness; it is enough if the witness shows such an acquaintance with the subject as to qualify him to give an opinion; and in an action to recover damages for injury to a mill, a witness, who is shown to be one of the owners of the mill, engaged in operating it, and to have knowledge of its structure and the injury, is *prima facie* competent to give an opinion as to the length of time required to repair it.

SAME.—*Negligence.—Interruption of Business.—Profits as an Element of Damages.*—Where an established business of a permanent character, as a mill for the manufacture of grain into meal, hominy or the like, is suspended by an overflow, and machinery used therein so injured that in order to make repairs a cessation of business is necessary, the net earnings or profits of the present and past are competent to be considered by the jury in estimating the owner's damages during the period that his business is so interrupted.

From the Vigo Superior Court.

B. E. Rhoads, E. F. Williams, T. A. Foley, H. C. Pugh and *H. B. Jones*, for appellant.

C. F. McNutt, S. B. Davis and *S. C. Davis*, for appellees.

ELLIOTT, J.—The complaint of the appellees seeks to recover damages for injuries alleged to have been caused by the negligence of the municipal authorities in constructing and maintaining sewers.

One of the principal questions argued by counsel arises on the ruling excluding evidence offered by the appellant. The purpose of appellant in offering this evidence was to prove that the defect in the system of sewers was in the plan, and not in the work of executing it, and that the defect was not

the result of negligence, but of an error of judgment. It has long been the law in this State that a municipal corporation is liable for negligence in devising the plan of a sewer constructed by it, as well as for negligence in the manner of doing the work. Of course, as long as no work is done under the plan no liability can arise, nor can a liability exist where there is nothing more than a failure to adopt a plan. But where a plan is adopted and carried into execution, then there is a liability if there was negligence in devising the plan. It is the duty of the municipal corporation to exercise reasonable care in providing a plan, as well as in doing the work under it.

In the case of *City of North Vernon* v. *Voegler*, 103 Ind. 314, the cases were collected, and it was said, among other things, that "the doctrine is not only sustained by authority, but is sound in principle. Suppose that the common council of a city determine to build a sewer, and cover it with reeds, can it be possible that the corporation can escape liability on the ground that the common council erred in devising a plan? Or, to take such a case as *City of Indianapolis* v. *Huffer*, *supra*, suppose the common council undertake to conduct a large volume of water through a culvert capable of carrying less than one-tenth of the water conducted to it by the drains constructed by the city, can responsibility be evaded on the ground of an error of judgment? Again, to take an illustration from a somewhat different class of cases, suppose the common council to devise a plan for a bridge that will require timbers so slight as to give way beneath the tread of a child." From the rule expressed in so many of our cases we can not depart, for it is not only well sustained by authority, but is right in principle. Morrill City Neg. 86.

While our cases have always held that municipal corporations are liable for negligence in devising a plan, they have from first to last declared that there is no liability unless there is negligence. *Rice* v. *City of Evansville*, 108 Ind. 7 (58 Am. R. 22); *City of North Vernon* v. *Voegler*, *supra*; *City of*

Crawfordsville v. *Bond*, 96 Ind. 236; *City of Evansville* v. *Decker*, 84 Ind. 325 (43 Am. R. 86); *Cummins* v. *City of Seymour*, 79 Ind. 491 (41 Am. R. 618); *Weis* v. *City of Madison*, 75 Ind. 241 (39 Am. R. 135); *City of Indianapolis* v. *Huffer*, 30 Ind. 235; *Stackhouse* v. *City of Lafayette*, 26 Ind. 17 (89 Am. Dec. 450); *City of Logansport* v. *Wright*, 25 Ind. 512.

It is, therefore, a question of paramount importance whether the municipal authorities exercised due care in securing a plan, for if they did exercise such care, then their error is one of judgment which can not create a liability. It is, however, negligence for men unskilled in the business of preparing plans for sewers to act upon their own judgment in cases where skill is required. *Bradbury* v. *Goodwin*, 108 Ind. 286. It is their duty to use reasonable care to procure the services of men skilled in such affairs, and if they fail to exercise this care they are guilty of negligence for which the corporation must answer. Undertaking to exercise judgment without skill in a matter which requires skill is not a mere error of judgment, but it is negligence. This is a familiar principle pervading all branches of jurisprudence. A man who undertakes as a lawyer to conduct an action at law without possessing skill is negligent; so, too, one who undertakes to treat a sick or wounded man as a physician or surgeon without possessing a fair degree of professional knowledge is guilty of a breach of duty. A mechanic who undertakes to build a house is liable in damages if, through ignorance, he does his work unskilfully. Negligence, according to Judge COOLEY'S definition, is "The failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand." Cooley Torts, 630; *Brown* v. *Congress, etc., St. R. W. Co.*, 49 Mich. 153.

If a municipal corporation undertakes the work of constructing a system of sewers, in a case where the assistance

of men skilled in such matters is essential to secure sewers that shall carry off the water conducted into them, without using reasonable care to procure such assistance, there is an absence of "the precaution and vigilance which the circumstances justly demand." If, however, the municipal authorities do exercise reasonable care in securing such assistance, and do exercise reasonable care in securing the employment of fair care and skill, they are not guilty of negligence. If, after bringing into exercise reasonable care to select skilled persons, and in securing the exercise of their skill, there is still a defect in the system, it must be attributed, not to negligence, but to an error of judgment. The case is strictly analogous to that of a railroad company sought to be held liable by one of its employees. In such cases it is uniformly held, that if ordinary care is used in the selection of the co-servants the company is not liable, although it may turn out that the co-servant was not capable of performing the duties entrusted to him. So, here, if the municipal corporation uses reasonable care to secure and put into exercise the services of competent engineers, it ought not to be held liable, although it does turn out that a mistake was made. It would impose a burden upon municipal corporations that no principle of right or justice warrants to hold them accountable where they have exercised reasonable care to secure a perfect and an adequate system of sewerage.

The principle which we are endeavoring to bring out is thus declared in *Johnston* v. *District of Columbia*, 1 Mackey, 427: "In the next place, a mere error of judgment in the construction of such work does not seem, on the authorities, to be a ground of action in the absence of carelessness in the selection of a plan, or the employment of proper agents to devise and execute it." A similar line of reasoning is pursued in *Van Pelt* v. *City of Davenport*, 42 Iowa, 308, where it was said: "The city can not be held liable unless for some neglect or omission of duty or negligence in its performance." At another place in the same opinion it was said: "As the city

must act through the agency of others, it was its duty to select a competent engineer. When such selection is made, the city has in that regard discharged its duty, and no direct negligence or omission is attributable to it. If a competent engineer acts in good faith in drafting the plans of a culvert, and honestly believes that he is making it large enough to accomplish the desired purpose, then no negligence of the servant is attributable to the principals. If he is sufficiently competent and makes a mistake after the honest exercise of his best judgment, it is such a mistake as is inseparable from human action. The making of such mistake can not be attributed to negligence, for negligence is the failure to exercise ordinary care."

It is possible for a common council to act negligently in devising a plan, as well as in any other matter. If that body undertakes to prosecute a public work which requires a plan, and that plan can only be devised and prepared by skilful or experienced men, it would be negligence for it to undertake the work without exercising reasonable care to secure the assistance of such men. A prudent man certainly would not undertake a work of that character without the aid of competent men, and a city is held to substantially the same degree of care as individuals. *Lehn* v. *City of San Francisco*, 66 Cal. 76; *Barnes* v. *District of Columbia*, 91 U. S. 540.

Deliberation on the part of the common council is futile unless the members have a fair knowledge of the matter which forms the subject of their deliberation. Men may deliberate to the end of time without accomplishing any useful purpose unless they possess knowledge of the thing they are considering. If councilmen are not skilled in devising plans for sewers, no length of time spent in deliberation can establish the fact that due care was exercised. Due care implies the employment of such means as will secure knowledge, not a deliberation without knowledge. Men who take no means to secure knowledge essential to intelligent deliberation do not exercise that care which the law requires. If,

in a case like this, councilmen proceed without knowledge, no matter how slowly, they do not exercise care; but if they use reasonable means to secure knowledge, and with deliberate care act upon it when secured, they are not negligent. If reasonable care is used to secure the preparation of plans by competent men, and ordinary care is used to see that the skill of the engineer or expert is brought into exercise, then there is no negligence, and can be no liability, although, when the plan is carried into effect, a defect may be developed which destroys or impairs its efficiency.

It is the law that where a municipal corporation collects in one channel a great body of water it must use reasonable care to provide an outlet for it. *Rice* v. *City of Evansville, supra*; *Lipes* v. *Hand*, 104 Ind. 503; *City of Evansville* v. *Decker*, 84 Ind. 325 (43 Am. R. 86); *Weis* v. *City of Madison, supra*; *City of Indianapolis* v. *Lawyer*, 38 Ind. 348.

But, while we concur with the appellees' counsel upon this point, it does not necessarily lead to the conclusion that evidence showing care in securing a plan was not competent. This is so, because the theory of the appellant is that the cause of the injury was a defect in the plan, and that the defect was the failure to provide for a sufficient number of catch-basins. There was some evidence tending to support this theory, and this was enough to render the evidence competent. A court can not, on a question of the admissibility of evidence, determine the weight of evidence; but if there is any evidence tending to support the theory which makes the evidence competent, whether it be direct or indirect, the offered evidence must be admitted when made in proper form.

Where a recovery is sought for injuries caused by a defective sewer, or by a sewer of inadequate size, and the defect or insufficiency is caused by a defect in the plan, it is competent for the municipal corporation to show that reasonable care was exercised in employing a competent engineer or expert to prepare the plan, and that ordinary care was used in

seeing to it that he did exercise skill and care. We do not mean, of course, that these things may be proved by a mere statement of conclusions, but that they may be proved by evidence of the specific facts leading to those conclusions. In this instance, if the offer had been properly made it would have been the duty of the trial court to allow evidence of the fact that reasonable care was used by the city in procuring the services of a competent engineer or expert, and in securing the exercise of his skill.

Evidence of consultation with experts employed to prepare plans, or of the examination of plans by councilmen, may be competent, although not in writing. It is not every act of a councilman that must be put on record. Councilmen in examining the locality where public improvements are to be made, or in examining plans, act in an official capacity, but these acts need not necessarily be exhibited in the record.

It is probably true that some of the evidence on the question under immediate discussion offered by the appellant was competent, but some of it—as for instance, some general conclusions where there should have been specific facts—was clearly incompetent, and, as the evidence was offered without separating the good from the bad, there was no available error in excluding it. *Louisville, etc., R. W. Co.* v. *Falvey*, 104 Ind. 409; *Cuthrell* v. *Cuthrell*, 101 Ind. 375; *Wolfe* v. *Pugh*, 101 Ind. 293; *Elliott* v. *Russell*, 92 Ind. 526.

For another reason there was no such error, and that is, because there were no specific questions asked for the purpose of eliciting the testimony alleged to have been improperly rejected. *Higham* v. *Vanosdol*, 101 Ind. 160; *Judy* v. *Citizen*, 101 Ind. 18; *Ralston* v. *Moore*, 105 Ind. 243; *Woolery* v. *Louisville, etc., R. W. Co.*, 107 Ind. 381; *Seavey* v. *Walker*, 108 Ind. 78.

One of the appellees was permitted to state the length of time it would require to repair the injury done by the overflow. It was objected that this testimony was incom-

petent because the witness was not shown to be an expert qualified to give an opinion. Conceding, but not deciding, that the question was one which none save an expert could properly answer, we think there was no error in admitting the testimony. The witness was, as the evidence shows, one of the owners of the mill, engaged in operating it, and had knowledge of the structure and its injury, and we regard this as *prima facie* sufficient to qualify him. No precise knowledge is required; it is enough if the witness shows such an acquaintance with the subject as to qualify him to give an opinion. *Colee* v. *State*, 75 Ind. 511; *Goodwin* v. *State*, 96 Ind. 550; *Sage* v. *State*, 91 Ind. 141, and cases cited. The value of his testimony depends, of course, upon the extent of his knowledge, but this does not necessarily determine its competency.

On the ruling of the court admitting testimony of the profits of the plaintiff's business arises another important question. This question is both important and difficult, and, in order to bring it clearly into view, it is necessary to refer to some of the evidence touching the matter out of which it emerges. The appellees were the owners of a large mill, and were engaged in the business of manufacturing and selling the products of corn. For this purpose their mill was equipped with machinery and appliances of great value. The water which was thrown upon their premises caused them to stop business for twelve days. The injury done by the water was so extensive as to render it necessary to make costly repairs. To make these repairs would require a cessation of business for sixty days. At the time of the trial these repairs had not been made, but they were required, as we must assume for our present purpose, and it was the intention of the appellees to make them. One of the appellees, having testified that the repairs were rendered necessary by the injury done by the water, and that it would require sixty days to make them, was asked by his counsel this question: "What are the reasonable earnings of that mill per day now?"

The witness answered: "There are times during the year when our net earnings are larger than at others." He was then asked: "What would be a fair average?" and he answered: "One hundred and fifty dollars per day."

It appears from the cross-examination that the term "net earnings," as used by the witness, meant profits, and this is the legal meaning of the term. *St. John* v. *Erie Railway Co.*, 22 Wall. 136.

It will be observed that the question asked does not refer to future profits, but to the average profits that the mill was then earning or had earned. The testimony upon this question was, it is important to keep in mind, as to the profits that the mill had earned and was then earning. This is an important factor in the investigation, and distinguishes the case very clearly and very distinctly from those cases in which it is held that evidence of speculative prospective profits is not competent. The question here is, had the appellees a right to prove what profits their mill had earned in the past, and what it was earning in the then present? There was no attempt to prove what it might earn in the future. What exists in the present, or has existed in the past, can not be considered a matter of speculation. It is not to be forgotten that the mill was and had been in active operation, with a known and established business. The case is for this reason not at all like one in which the business has not been in existence. It is this fact which distinguishes the case under examination from the case of *Western Gravel Road Co.* v. *Cox*, 39 Ind. 260, upon which the appellant places so much stress. In that case the profits were entirely prospective; they were neither matters of the present nor the past, but were wholly of the future. The fact that the profits were of the present and the past distinguishes this case from the rule asserted in *Glass* v. *Garber*, 55 Ind. 336, that merely speculative profits can not be taken into consideration in estimating damages. Indeed, the fair deduction from that case is that known profits may be taken into consideration, for it was

there said: "And we think, if, in consequence of the facts averred, the complainant's house and fixtures therein and place of business became useless to him for a time, that it is a fair element for a jury to consider, in estimating damages." The decision in *Masterton* v. *Village of Mt. Vernon*, 58 N. Y. 391, does support the appellant's theory, for it does decide that evidence of past profits is not competent, but the case is not well considered, and, as we shall presently show, is not in line with the current of decision in the same court, nor with the current of authority elsewhere.

The last of the cases cited by the appellant on this point is *Griffin* v. *Colver*, 16 N. Y. 489. That case holds that future profits, speculative and contingent in their nature, are not to be considered in estimating damages. If it stopped at that point it would do the appellant no good, but it goes further, and decides that "The general rule is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain." To us it seems that the extract we have made is the law, and is in favor of the appellees upon the question of the admissibility of evidence of past and present profits. These are certain; one is in the domain of the past, the other in that of the present; neither in that of the future.

Turning to the authorities upon the general question, and prefacing our discussion of them by the statement that we are now immediately concerned with the question whether evidence of profits earned in the past and in the present is competent, not what its weight or effect is, we lay down the general rule that the evidence is competent.

In the well considered and strongly reasoned case of *Simmons* v. *Brown*, 5 R. I. 299, it was held, in a case where a mill for the manufacture of cotton goods was injured by an overflow, that evidence of profits earned was competent. The court, in the course of the opinion, said: "For this reason, evidence as to profits, as a general rule, is rejected; because, generally, they are uncertain and contingent; depending upon

other circumstances than the injurious act of the defendants, and not the natural result of it. Nevertheless, the general rule is subject to many exceptions; and it will be seen from the cases upon this subject, that wherever the loss of profits is the natural and necessary result of the act charged,—such as the party probably would have made, not what by chance he might have made, but what any prudent man must naturally have made,—evidence has been, if not always, most usually, admitted as to them."

White v. *Moseley*, 8 Pick. 356, is in principle the same as the case from which we have quoted, and it was held that evidence of loss of profits was competent.

In *Chandler* v. *Allison*, 10 Mich. 460, a landlord wrongfully destroyed a store in the possession of a tenant, and it was held that for loss consequent upon the interruption of his business the tenant might recover. That case came again before the Supreme Court of Michigan, and the ruling on the first appeal was adhered to, and a very forcible opinion was written by CHRISTIANCY, J., in which, among other things, it was said: "To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year; and he is ousted from the premises and this business entirely broken up for the balance of the term; can he be allowed to recover nothing but six cents damages for his loss?" *Allison* v. *Chandler*, 11 Mich. 542.

The case of *Shafer* v. *Wilson*, 44 Md. 268, is strongly in point. In that case the defendant had injured the plaintiff's premises and broken up his business. On the trial the plaintiff was asked this question: "What were about the usual profits of your business prior to the commencement of digging by Shafer?" and the answer was, "From fifteen to

twenty dollars per day." This evidence was held competent. In *Ingram* v. *Lawson*, 6 Bing. (N. Cas.) 212, the defendant was sued for libel in publishing a statement that the plaintiff's vessel was unseaworthy, and it was held that the loss of the profits of the voyage was a proper ingredient to be considered in estimating damages, the court saying: "The jury must have some mode of estimating the damages, and they could not be in a condition to do so, unless they knew something of the nature of the plaintiff's business, and the general return from his voyages."

The cause of action in *Tarleton* v. *McGawley*, 1 Peake N. P. C. 205, was for a tort in firing upon some negroes near the plaintiff's trading post on the coast of Africa, and thus deterring them from trading with him, and it was held that the loss of profits consequent upon an interruption of his business was a proper matter for the consideration of the jury.

The case of *Lacour* v. *Mayor of New York*, 3 Duer, 406, was, in its main features, very like the case we have in hand, and it was held that the plaintiff was entitled to recover for loss of profits during an enforced suspension of business.

In *St. John* v. *Mayor*, 6 Duer, 315, it was held that loss of profits resulting from an interruption of plaintiff's business should be taken into consideration in computing the damages. The case just referred to was expressly approved in *Walter* v. *Post*, 6 Duer, 363 (373), and it was said: "In actions to recover against a *tort-feasor*, the loss of profits may be taken into view in estimating the damages."

In the case of *Chapman* v. *Kirby*, 49 Ill. 211, the plaintiff sued to recover damages for the tort of the defendants, in wrongfully depriving his mill of steam power, and it was held that the loss of profits should be taken into consideration. The court there said: "And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable

period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect, that, in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained with a reasonable degree of certainty. Nor do the views here expressed conflict with the case of *Green* v. *Williams*, 45 Ill. 206, as in that case the lessee had not entered upon the term; had not built up or established a business, and had not suffered such a loss."

The adjudged cases very clearly show that, in actions to recover for damages resulting from a tort, a more liberal rule in favor of the plaintiff prevails than in actions to recover for a loss resulting from a breach of contract; yet, in the latter class of cases, the overwhelming weight of authority supports the doctrine that profits, when not entirely speculative, may be taken into account.

This subject received a careful consideration in the case of *Wakeman* v. *Wheeler, etc., Co.*, 101 N. Y. 205 (54 Am. Rep. 676), and it was held that profits were to be taken into account in ascertaining the damages resulting from a breach of contract, and the decisions of the Court of Appeals in the cases of *Taylor* v. *Bradley*, 39 N. Y. 129, *Schell* v. *Plumb*, 55 N. Y. 592, *White* v. *Miller*, 71 N. Y. 118 (27 Am. Rep. 13), *Mitchell* v. *Read*, 84 N. Y. 556 and *Danolds* v. *State*, 89 N. Y. 36 (42 Am. Rep. 277), were cited as fully sustaining the ruling, as was also the case of *Masterton* v. *Mayor*, 7 Hill, 61 (42 Am. Dec. 38).

This is the modern English rule, whatever it may have been at an earlier time. *Simpson* v. *London, etc., R. W. Co.*, L. R. 1 Q. B. D. 274 (16 Moak Eng. Rep. 330); *McNeill* v. *Reid*, 9 Bingh. 68; *Fletcher* v. *Taylour*, 17 C. B. 21. It is the Pennsylvania doctrine. *Hoy* v. *Gronoble*, 34 Pa. St. 9; *Garsed* v. *Turner*, 71 Pa. St. 56. The same rule has been approved and enforced by the Supreme Court of the United States. *United States* v. *Behan*, 110 U. S. 338.

Our own court has quite as strongly affirmed this doctrine as any other. In *Page* v. *Ford*, 12 Ind. 46, the case of *White* v. *Moseley*, *supra*, was approved. The doctrine is carried much further in *Fultz* v. *Wycoff*, 25 Ind. 321, than we are required to do here, and the decision in *Ingram* v. *Lawson*, *supra*, was expressly approved. *Fultz* v. *Wycoff*, *supra*, was approved in *Frenzel* v. *Miller*, 37 Ind. 1, and in *Niagara*, *etc.*, *Ins. Co.* v. *Greene*, 77 Ind. 590. In the latter case the court said: "But the truth is, probable profits which might have been received, not remote or merely speculative, have often been allowed in proof, not as the measure of damages, but to aid the jury in estimating the damages."

Mr. Wood, in a note to his edition of Mayne on Damages, says: "Whatever may formerly have been the rule, there is now no question but that profits are recoverable as special damages, in case they are certain, and such as might naturally be expected to follow the breach. 'Gains prevented as well as losses sustained,' says ANDREWS, J., 'may be recovered for as profits, when they can be rendered reasonably certain by evidence, and have naturally resulted from the breach.'" Page 36.

A great number of cases are cited in support of this proposition, and they do sustain it.

The cases are harmonious in holding that the earnings of a lawyer or a physician may be proved. *City of Logansport* v. *Justice*, 74 Ind. 378 (39 Am. R. 79), and cases cited; *Town of Elkhart* v. *Ritter*, 66 Ind. 136. These cases all proceed upon the theory that, although it can not be certainly determined what would be the earnings in the future, the evidence is competent for the purpose of assisting the jury in measuring the damages. The principle underlying these cases is, as the reasoning of the courts shows, the same as that which prevails in cases where the profits can be ascertained with reasonable certainty.

It is not to be forgotten that the law does not require absolute certainty in any case. Even in crimes of the highest

grade demonstration is not required. In civil cases all that is deemed requisite is a fair and reasonable degree of probability. Lord Mansfield says "that the only degree of certainty attainable in judicial proceedings is a probable one," and this is the doctrine of logical as well as of law writers. It is, indeed, impossible to secure any higher degree of certainty in human affairs, although there may be degrees of probability. All that can be required in any case or upon any subject is that the evidence shall tend, with a fair degree of probability, to establish a basis for a relevant inference. It can not, therefore, be necessary that to entitle evidence to admission it must possess an absolute certainty; it is enough that it establishes a reasonable probability.

We think it clear that where there is an established business of a permanent character, as a mill for the manufacture of grain into meal, hominy or the like, the net earnings of the present and the past are competent to be considered by the jury in estimating damages. As said by BRYAN, J., in his opinion in *Stern* v. *Rosenheim*, 8 Cent. Rep. 881, "The value of an established business may be ascertained with reasonable certainty, although it may depend entirely upon the profits which accrue from its successful prosecution. In actions of tort the jury are always permitted to assess damages for injury or destruction of business. *Straburger* v. *Barber*, 38 Md. 103."

If the loss consequent upon an interruption or destruction of business can not be considered by the jury, then the plaintiff can not be compensated. Either he must be allowed for this loss or he must be denied compensation; but he can not be denied compensation, and, therefore, the loss must be allowed him. The rule is elementary, lying, indeed, at the very foundation of the law of damages, that the plaintiff who has suffered a loss shall recover, at the very least, such a sum as will compensate him for the loss actually sustained. If a man whose business is earning him one hundred dollars per day is driven from that business, he certainly loses that much, and no in-

genuity of argument nor acuteness of speculation can make it appear otherwise when the question is brought into the full light of reason.

The appellees were certainly entitled to recover for the twelve days during which they actually ceased business. It was, therefore, competent to prove the average profits for the purpose of showing the actual loss during that period. But the appellees could not split up their cause of action; they must recover once for all. As Mr. Freeman says, "All the damages which can, by any possibility, result from a single tort, form an indivisible cause of action." Freeman Judgments, section 241. The cases upon this subject are collected in a very able article by Mr. Starr, and the soundness of the rule strongly maintained. 26 Am. Law Reg. 281; *City of North Vernon* v. *Voegler*, *supra*, and cases cited.

Under this general rule, the evidence was competent to be considered in determining the compensation the appellees should recover for the time that would actually be lost in making repairs rendered necessary by the overflow. Of course, recovery could only be had for such a length of time as would be required to repair injuries attributable solely to the effect of the overflow, and in making such repairs the appellees would be bound to proceed with all reasonable care, skill and diligence.

In holding the evidence competent to go to the jury to assist them in estimating damages, we by no means hold that the basis of the recovery is the profits that might be realized during the sixty days interruption of business. We are far from declaring such a doctrine, for all that we need decide upon the question of the admissibility of the evidence is, that it was proper for the jury to give it consideration in estimating the damages.

The instructions asked by the appellant upon the measure of damages assert that the appellees can in no event recover more than the rental value of the mill during the time of making the repairs. If we were right in our conclusions

upon the rulings on the admissibility of evidence, these instructions assert a doctrine radically wrong, and we need not again discuss the question. If the property injured had been occupied as a dwelling-house, and had not been essential to the operation of an established business, the rule declared in the appellant's instructions would, doubtless, be the correct one. *City of Indianapolis* v. *Huffer, supra; City of South Bend* v. *Paxon*, 67 Ind. 228. But here the mill and its equipments were indispensable instrumentalities in the business of the appellees; without them their business ceased and they lost its value. The fact that the appellees had an established business and that the mill was necessary to the continuance of the business exerts, we repeat, an important influence upon every phase of the case.

The third instruction given by the court is as follows: "If you should find from the preponderance of the evidence in this case that the plaintiffs' business as partners has been injured or interrupted by the defendant's wrong-doing, as complained of, this will form an element of damage which the plaintiffs will be entitled to recover; and with a view to awarding the plaintiffs adequate compensation upon this branch of the damages, you will have a right to take into consideration the nature and extent of the plaintiffs' business at the time of the injury, if any, its past productiveness and its reasonable profits accruing to the plaintiffs in the past—not for the purpose, however, of measuring the damages by expected or contingent profits of which the plaintiffs were deprived by such injuries, but to assist the jury, in the exercise of a sound judgment, to arrive at a just and adequate compensation for the actual injuries sustained." It is true that this instruction is subject to verbal criticism, but it does not assert any erroneous legal proposition.

Appellant's counsel are mistaken in assuming that it directs the jury that profits are to be considered as an element of damages. It asserts the very reverse of this, for its declaration is that profits are not to be considered for the purpose

of measuring the damages, but to aid the jury in arriving at a just conclusion as to the compensation for the actual injuries. The term "element" does not refer to profits, but to the injury and interruption of business. The clause in which the word "element" occurs very clearly shows that the court referred "to the injury and interruption of business," and this is consistent with the entire frame and scope of the instruction. Nor does the instruction direct the jury to allow future or contingent profits; on the contrary, it in express terms restricts their inquiry to the past productiveness of the business, and to "its reasonable profits accruing to the plaintiffs in the past."

It may be that, had the appellant requested more specific instructions as to the time within which the mill must be repaired, and as to kindred matters, it would have been the duty of the trial court to give them; but as the instruction given asserts no erroneous proposition, and so far as it goes is correct, there is no available error. *Colee* v. *State*, *supra*, and cases cited.

Instructions numbers one, two and three asked by the appellees, when considered, as they must be, in connection with all the other instructions, can not be regarded as erroneous. It is true that the basis of all actions like the present is negligence on the part of the municipal authorities; but where they collect and confine in one channel a body of water it is negligence not to use reasonable care to provide an outlet. This rule is founded on sound principle, and, as already shown, is thoroughly supported by authority. The corporation is not liable for fighting off surface-water, as a private citizen may do, but it has as little right as he has to confine it in a channel and conduct it in a body to another's premises without exercising due care to prepare means for its escape without injury.

The judgment is affirmed, at the cost of the appellant.

Filed Nov. 1, 1887; petition for a rehearing overruled Dec. 28, 1887.

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No. 12,988.

COGGESHALL v. THE STATE, EX REL. CORDER.

PARTITION.—*Sale of Real Estate.—Appointment of Commissioner.—Pleading.*—Allegations that a commissioner to sell real estate was appointed at a certain term of court, and gave bond, which was approved by the court, etc., sufficiently shows that the appointment was made by the court.

SAME.—*Averment that Money is Due.*—A complaint on the bond alleging that the commissioner's final report showed that he had in his hands a certain sum as the relator's distributive share of the proceeds of the sale, which had never been paid to the relator by any one, is good, without a direct averment that there is due from the commissioner the sum mentioned.

SAME.—*Commissioner to Sell.—Vacancy.—Power to Appoint Successor.*—Although there is no statute expressly providing for the appointment of a successor, in case of a vacancy, to a commissioner appointed to sell land in partition proceedings, the court nevertheless has power to fill such vacancy, and to require a bond conditioned for the faithful discharge of the duties of the trust.

SAME.—*Duty of Commissioner to Make Distribution.—Bond.*—Under section 1204, R. S. 1881, it is the duty of the commissioner or his successor to pay the money arising from the sale to the persons entitled thereto, according to their respective shares, under the direction of the court, and this statutory provision becomes a part of the bond executed by him as fully as if written therein.

SAME.—*Paying Proceeds of Sale to Clerk.—When no Defence to Action on Bond.*—The fact that the commissioner paid to the clerk of the court the proceeds of the sale and took his receipt therefor, is no defence to an action on the bond of such commissioner by distributees, unless such payment was authorized by an order of the court.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

J. F. McDowell and *G. A. Henry*, for appellee.

HOWK, J.—In this case, errors are assigned here by appellant, defendant below, which call in question the decisions of the circuit court in overruling (1) his demurrer to the relator's complaint herein, and (2) his motion for a new trial.

This suit was commenced on the third day of August,

1885. In his complaint herein, the relator alleged that, at the November term, 1874, of the court below, in an action then and there pending between Mary Spears *et al.* and the relator and others for the partition of certain lands, of which the parties to the action were then owners as tenants in common, it having been found that such lands could not be divided without injury to the owners, an order was entered by the court for the sale thereof, and one Linder was appointed a commissioner to make such sale, and, pursuant to such order, made sale of such lands; that, after such sale, Linder resigned his trust as such commissioner, and his resignation was accepted by the court and he was discharged; that afterwards, at the April term, 1879, of such court, one John Haisley was appointed commissioner to collect and make distribution of the proceeds of the aforesaid sale of such lands, and thereupon, under such appointment, said Haisley gave his bond with appellant, Coggesball, as surety therein, a copy of which bond was filed with and made part of such complaint; that such bond was then and there duly approved by the court, and said Haisley entered upon the discharge of his duties as such commissioner; that, at the September term, 1879, of the court, said Haisley made his final report of his acts as such commissioner, which report showed that he, as such commissioner, had in his hands at that time, belonging to the relator herein, the sum of $232.06, as relator's share of the proceeds of the aforesaid sale of such lands; and that said commissioner failed to pay such sum of money to the relator at any time, and relator never received the same from such commissioner, or from any one for him; and relator averred that, by reason of such failure, the conditions of such commissioner's bond were broken.

And the relator further alleged that, on November 6th, 1879, said Haisley died, and administration of his estate had been had, and, at the February term, 1884, of the court, his administrator had been discharged; that, in the settlement of such estate, no account was taken of the amount shown

to be due the relator herein; and that, during all that time, relator was a minor under the age of twenty-one years, and without a legally appointed guardian; that, in November, 1884, relator came of lawful age, and that demand had been made upon appellant, Coggeshall, for such sum of money due relator from John Haisley, as commissioner, who refused payment. Wherefore, etc.

A number of objections to the sufficiency of the relator's complaint are urged here by appellant's learned counsel, and these objections we will briefly consider in the order of their statement in the brief of counsel: First, it is claimed by counsel that "the complaint is obnoxious to demurrer, for the reason that it does not charge that John Haisley was appointed a commissioner by the court below." It was alleged in the complaint, after stating that Linder's resignation of his trust as commissioner "was accepted by the court," that afterwards, "at the April term, 1879, of said court, John Haisley was appointed commissioner to collect and make distribution of the proceeds of the sale of said real estate;" and that, thereupon, John Haisley gave the bond in suit, with appellant as his surety therein, "which bond was then and there duly approved by the court, and said Haisley entered upon the discharge of his duties as such commissioner." By these averments the complaint showed with reasonable certainty, amply sufficient as it seems to us to withstand appellant's demurrer thereto, that John Haisley was appointed a commissioner by the proper court; especially so, as, under the law, such appointment could only be made by the court.

2. Appellant's counsel further insists that the complaint was bad on demurrer for the want of a direct averment therein that "there was due from said commissioner the sum of $232.06." It was alleged in the complaint that it was shown by Haisley's final report to the court, as such commissioner, that he had in his hands such sum of $232.06, as the relator's distributive share of the proceeds of the lands sold; that said commissioner failed to pay such sum of money

to the relator at any time, and that relator never received the same from such commissioner, or from any one for him. Counsel claims that these averments were not equivalent to an allegation that there was that amount due; because, counsel says, "the final report or the order of court might afterwards have been set aside, changed or modified." So they might have been; but if they had been it would have been competent for appellant to have shown the fact by his answers and evidence. There is nothing in this objection to the sufficiency of the complaint.

3. It is further claimed by appellant's counsel that the relator's complaint was bad on demurrer because "there is no provision in the statute concerning the partition of lands (sections 1186 to 1209, R. S. 1881,) authorizing the appointment of a successor of a commissioner resigned, and requiring him to give bond as the first commissioner." It is true that the statute does not expressly provide that if a commissioner appointed to sell lands in a suit for the partition thereof shall die, resign or be removed from his trust before the same has been fully executed, the proper court may appoint a successor to discharge the duties of such trust remaining to be discharged at the time of the vacancy, and may require of such successor "a bond payable to the State of Indiana in such penalty as the court may direct, conditioned for the faithful discharge of the duties of his trust." In section 1206, R. S. 1881, it is provided that "The occurrence of a vacancy shall not invalidate the previous acts of the commissioners; and a successor shall take up and continue the proceedings, which shall be as valid as if the same had been done by the commissioners first appointed."

It is true, perhaps, as claimed by appellant's counsel, that this section of the statute has especial reference to the occurrence of a vacancy in the three commissioners appointed by the court to make partition of lands, and not to a vacancy occurring in the commissioner appointed to sell the lands under the order and judgment of the court, where the lands

can not be divided without damage to the owners. But, whatever may be the proper construction of the section quoted, and though it be true that the statute does not expressly provide for the appointment of a successor in the event of the death, resignation or removal from his trust of the commissioner first appointed to sell lands, we are clearly of the opinion that, after its acceptance of Linder's resignation of the duties of his trust as commissioner to sell, the court below had full power and authority to appoint John Haisley as his successor in such trust, and to require of him the execution of the bond in suit, conditioned for the faithful discharge of the duties of his trust. Under the provisions of our statute concerning the partition of lands, a commissioner to sell the lands, under the order and appointment of the court, becomes in legal effect the trustee of an express trust, whereof the owners of such lands are the *cestuis que trust*.

It is well settled by our decisions that the court, having jurisdiction of such a trust, may fill vacancies, however occurring, in the position of the trustee thereof, and may require any such trustee to execute bond, with sufficient sureties, conditioned for the faithful discharge of the duties of his trust. *Thiebaud* v. *Dufour*, 54 Ind. 320; *Tucker* v. *State, ex rel.*, 72 Ind. 242; *Bates* v. *State, ex rel.*, 75 Ind. 463; *Hinds* v. *Hinds*, 85 Ind. 312.

4. Appellant's counsel further claims that the complaint was bad on demurrer because "the bond in suit, by its terms, only authorized the commissioner to 'receive' the proceeds of the sale of certain real estate, described in the order to sell, etc. The bond does not authorize the commissioner to pay out the money in his hands; it only authorizes the receiving of the money, and not the disbursing of the same. How can an action be maintained on the bond to compel him to do that which he is not bound to do?"

This objection of counsel to the sufficiency of the complaint is wholly untenable, and can not be sustained. The bond sued upon, by its terms, was conditioned that the com-

missioner should "faithfully discharge the duties of his trust according to law." The duties of his trust were and are prescribed in section 1204, R. S. 1881, as follows: "The moneys arising from such sale, after payment of just costs and expenses, shall be paid by such commissioner to the persons entitled thereto, according to their respective shares, under the direction of the court." These statutory provisions, under our decisions, entered into and formed a part of the bond in suit as fully as if they had been written therein. *Bryson* v. *McCreary*, 102 Ind. 1; *Edwards* v. *Johnson*, 105 Ind. 594; *Long* v. *Straus*, 107 Ind. 94; *Warren* v. *Sohn*, *ante*, p. 213.

In his complaint herein the relator alleged, in effect, that the commissioner, Haisley, did not faithfully discharge the statutory duties of his trust, in that he had failed to pay such relator his distributive share of the money arising from the sale of such real estate under the direction of the proper court. The complaint stated facts sufficient to constitute a good cause of action against the appellant, and his demurrer thereto was correctly overruled.

In appellant's motion for a new trial the only causes assigned therefor were, (1) the finding of the court was not sustained by sufficient evidence, (2) the finding of the court was contrary to the evidence, and (3) the finding of the court was contrary to law.

Appellant's defence to relator's cause of action was, briefly stated, that Commissioner Haisley made his final report to the court below in the matter of his said trust at the September term, 1879, of such court, to wit, on the 8th day of September, 1879; that by such report it was shown that the relator's distributive share of the moneys received by such commissioner from the sale of such real estate was the sum of $232.06; that on the same day the commissioner, Haisley, paid such sum of money into court to the clerk thereof, and took his receipt therefor, written on the margin of such commissioner's final report; and that such final report, with such

receipt on the margin thereof, was then and there submitted to and approved by the court, and that Commissioner Haisley was then and there discharged from the duties of his trust.

Relator replied to appellant's defence, in effect, that such final report was made and filed by Commissioner Haisley in the clerk's office of such court, in vacation, on the 30th day of June, 1879, and long before the September term, 1879, of the court; that the sum of money shown by such report to be due the relator was not paid into court, but was in fact paid by Commissioner Haisley to one John H. Zahn, on the 30th day of June, 1879, who receipted therefor in his individual name, and not officially as clerk of such court; that no order was ever made by the court authorizing or requiring Commissioner Haisley to pay the money in his hands belonging to the relator into court, or to the clerk thereof; and that no approval of such final report was shown by the records of the court.

The evidence is properly in the record, and fully sustains the facts alleged by appellee in his reply.

In *Jenkins* v. *Lemonds*, 29 Ind. 294, and in *Carey* v. *State, ex rel.*, 34 Ind. 105, it was held, substantially, that there was then no law of this State rendering the sureties of the clerk of the court liable for moneys paid into open court and received by such clerk, there being then no law making it the duty of the clerk to receive such moneys. To obviate the effect of these decisions, a law was enacted and became in force on the 9th day of March, 1875, whereby the clerks of the several courts of this State were authorized to receive all such funds as might be ordered to be paid into the courts whereof they were clerks by the judges thereof, and such clerks, with their sureties, were made liable on their official bonds for all moneys so paid into such courts, under the orders of the judges thereof, to any person who might be entitled to demand and receive such money. In the absence of any order of the court below authorizing Commissioner Haisley to pay the

relator's money into court, we are of opinion that his payment of such money to the clerk of the court was wholly unauthorized by law, and constituted no valid defence for him or his surety to the relator's suit for the recovery of such money.

The finding of the court herein was sustained by the evidence, and was not, we think, contrary to law.

The judgment is affirmed, with costs.

Filed Dec. 20, 1887.

119 568
118 23
116 523

No. 13,650.

Gibson, Administrator, v. Keyes.

Mortgage.—*Fractions of a Day.*—The law will regard fractions of a day when important in the settlement of conflicting interests.

Same.—*Mortgages Executed on Same Day.—Priority.*—Where separate mortgages are executed to different parties on the same day, the one first executed and delivered will have priority. *Cain* v. *Hanna*, 63 Ind. 408, and *Moffitt* v. *Roche*, 76 Ind. 75, distinguished.

From the Clark Circuit Court.

M. Z. Stannard and *G. H. D. Gibson*, for appellant.

J. K. Marsh and *W. H. Watson*, for appellee.

Zollars, J.—Carr, the decedent, held a promissory note against Edward Green, secured by a mortgage upon a town lot. Appellee also held a promissory note against Green, to secure which a mortgage was given, but, by mistake, a lot not owned by Green was described therein instead of a lot which he did own. Wishing to exchange his town lots for a farm, Green requested Carr and appellee to surrender their

mortgages upon the lots and take new mortgages upon the farm. To that they consented. Between Green and Carr it was agreed that his, Carr's, mortgage, to be taken on the farm, should be first in time, and thus a prior lien. There was no agreement or understanding between Carr and appellee as to whose mortgage should be first in time or superior as a lien upon the farm.

In pursuance of the agreement between Carr and Green, and, perhaps, partially as the result of Carr's diligence, Green executed to him a mortgage on the farm, on the 5th day of March, 1878. On the same day, but two hours subsequent to the delivery of that mortgage, Green executed a mortgage upon the same farm to appellee. Carr's mortgage was delivered to the recorder first, but both mortgages were recorded on the day of their execution.

Is the Carr mortgage entitled to priority by reason of having been executed two hours before that of appellee? The court below held that neither is entitled to priority.

We are informed by the briefs of counsel that the ruling was based upon the fact that the mortgages were executed on the same day. In support of that ruling, counsel for appellee cite the cases of *Cain* v. *Hanna*, 63 Ind. 408, and *Moffitt* v. *Roche*, 76 Ind. 75. It will be found, upon an examination, that in neither of those cases was the question for decision here decided. It was held in the case of *Cain* v. *Hanna*, *supra*, with reference, of course, to the case before the court, that there is no priority where separate mortgages are executed by the same mortgagor to several mortgagees, upon the same day, and upon the same real estate, and to secure debts having no priority. It was not shown in that case that the mortgages were executed at different hours in the day, and hence, it might well be said, as it was in the decision of the case, that no precedence was shown as between the mortgages. The case of *Moffitt* v. *Roche*, *supra*, involved a single mortgage given to several persons to secure separate obligations to each. It was said that the giving of such a

mortgage was equivalent to the giving of separate mortgages to each, without giving priority to any, when, as was there the case, the obligations were all made to mature at the same time. What was there said as to separate mortgages had reference to such mortgages made at the same time. Clearly, there is nothing in that case that at all sustains appellee's contention here.

As a general rule, as has often been said, the law does not allow of the fraction of a day. That rule, however, is in fact a fiction of the law, and is applicable to judicial proceedings, to prevent confusion and difficulty, rather than to private transactions.

In the well considered case of *Louisville* v. *Savings Bank*, 104 U. S. 469, the Supreme Court of the United States quoted with approval the following from the decision by Mr. Justice LAWRENCE in the case of *Grosvenor* v. *Magill*, 37 Ill. 239, viz.: "It is true that for many purposes the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into the fractions of any other unit of time. 2 Bl. Com. 140, notes. The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month, which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules." See, also, the other cases there cited.

The following is a part of the syllabus of the case of *Murfree's Heirs* v. *Carmack*, 26 Am. Dec. 232, which is in accord with the reasoning of the court, viz.: "Where two persons claim the same tract of land from a common source, by different conveyances, executed on the same day, the time of day such conveyances were executed may be proved, for the purpose of showing who has the better right." See, also, the cases collected and quoted from in the note.

The authorities abundantly show, that for the purpose of settling conflicting claims and titles the hours of the day when the conveyances to the several claimants were made may be shown. In other words, in the application of the maxim "*Qui prior est tempore, potior est jure,*" it may always be shown upon what day, or at what hour of the day, the deeds or mortgages out of which the conflicting claims arose were executed.

If, instead of claiming under mortgages, the parties here were claiming under deeds, clearly, either party would have the right to show at what hour of the day the deeds were executed, in order to show that he holds the superior title.

The rule applicable to deeds is equally applicable to mortgages. A mortgage in this State does not carry title, but it does create an interest in the land, and constitutes a lien which, by foreclosure, may ripen into a title. It may be observed, also, that our statute recognizes fractions of a day as connected with mortgage liens. R. S. 1881, section 2951.

The judgment must be reversed and a new trial ordered. That the Carr mortgage was executed and delivered two hours before appellee's, is established by the evidence, without any conflict whatever.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to sustain appellant's motion for a new trial.

Filed Dec. 23, 1887.

No. 12,699.

112 572
130 94
112 572
131 104
112 572
140 441
112 572
150 101
112 572
166 287

JARBOE *v.* SEVERIN ET AL.

TRIAL.—*By Court.—Jury.—Waiver of Objection.—Practice.*—Where a party does not ask for a trial by jury, nor object to a trial of the cause by the court, with a jury as advisory merely, it is too late to object on appeal to the mode of trial.

JUDGMENT.—*Former Adjudication.—Estoppel.*—A judgment in a former action between the same parties is conclusive, and bars a subsequent action, if the same facts were presented for adjudication and an opportunity afforded to litigate the entire subject-matter.

From the Clay Circuit Court.

S. W. Curtis, for appellant.

G. A. Knight and *C. H. Knight*, for appellees.

MITCHELL, C. J.—Waiving some questions of minor importance, involving the completeness of a bill of exceptions, which purports to contain all the evidence given at the trial, there remain for consideration questions relating to the effect of a former adjudication which was pleaded, and whether or not the finding of the court is supported by the evidence in the record. The complaint was not substantially different from that considered when the case was here on a former appeal. *Jarboe* v. *Severin*, 85 Ind. 496.

It is only necessary to say, in this connection, that the action was brought to recover the value of the appellant's inchoate interest in certain real estate, which is alleged to have been conveyed by Mrs. Jarboe and her husband to Severin, Ostermeyer & Co., by a deed of trust, on the 16th day of March, 1876, and to enforce a vendor's lien therefor. Among other defences, the appellees pleaded a former adjudication of the matters involved in the complaint, and that there was no consideration for the agreement relied on.

Briefly stated, the facts are that William Jarboe, the appellant's husband, had become largely indebted to the appellees, who were partners doing business under the firm name

of Severin, Ostermeyer & Co. This indebtedness was secured by several mortgages, in the execution of which Mrs. Jarboe had joined, upon separate parcels of real estate owned by her husband. Not wishing to incur the expense of foreclosure proceedings, an agreement was made between the mortgagor and mortgagees, in pursuance of which all the real estate mortgaged, except lot 17, in one of the additions to the town of Brazil, was conveyed to the mortgagees in trust, to be sold at certain specified prices. The mortgagees were to execute conveyances to purchasers, and apply the proceeds to the liquidation and discharge of the mortgage debt. There was a stipulation in the deed to the effect that the existing securities should in no wise be impaired or invalidated by the trust. Failing to sell any of the property, the mortgagees foreclosed their mortgages in the May term, 1877, of the Clay Circuit Court. Jarboe and wife were made parties to the proceedings and decree, which included with the other mortgaged property lot 17, above mentioned. The mortgaged premises were subsequently sold by the sheriff of Clay county, in pursuance of the above mentioned decree, Severin, Ostermeyer & Co. becoming the purchasers, and receiving a sheriff's deed therefor in due course of time. Jarboe and wife surrendered possession of all the lands embraced in the decree and sale, except lot 17, which they were occupying as a residence, and which they refused to surrender. Thereupon, at the January term, 1879, of the Clay Circuit Court, a suit in ejectment was brought by the appellees against William Jarboe.

Mrs. Jarboe was subsequently admitted, upon her own application, as a party defendant to that action. Having been thus admitted, she filed a cross-bill, in which she set up, in substance, that prior to the execution of the trust deed the appellees orally agreed with her, in consideration that she would join her husband in the deed of trust hereinabove mentioned, and thereby release her inchoate interest in all the lands covered by the several mortgages, except lot 17,

they would foreclose the mortgages upon the whole and afterwards convey to her lot 17 above described. She alleged that she had fully performed the agreement on her part, and that the appellees' purchase and holding of lot 17 was, therefore, in trust for her. She prayed that the appellees might be decreed to convey the lot to her, or if the court should find that she was not entitled to that relief, she prayed for judgment against the appellees for $2,000, the alleged value of the property which they refused to convey.

Issues were made upon the cross-complaint, and upon the trial there was a finding and judgment against the cross-complainant.

Upon the application of William Jarboe a new trial was granted as a matter of right. At a subsequent term of the court judgment was again rendered against the cross-complainant, she having refused to reply to the amended answers which were filed to her cross-complaint.

Some objection is taken here that the case now before the court was tried below without a jury, as a chancery cause, the court having required the jury to respond to certain questions of fact for its information merely.

Although the suit was in one aspect an action to recover the value of property, the complainant asked as relief that the amount of her recovery should be declared an equitable lien against lot 17. It was, therefore, properly triable as an equity case. But whether it was or not, the appellant did not ask to have the case tried by a jury, nor was there any objection to the trial by the court, with a jury as advisory merely. This being so, it is too late now to question the correctness of the mode of trial which was pursued by the court with the assent of all the parties. *Ikerd* v. *Beavers*, 106 Ind. 483; *Farmers' Bank, etc.*, v. *Butterfield*, 100 Ind. 229.

Upon the facts stated and the issues as tendered by the appellant in her cross-complaint in the ejectment suit, there can

be no doubt but that she had the right to litigate the entire subject-matter embraced in her complaint in this action. She presented by way of cross-action in that case the same facts, in substance, as are put forward in her complaint in this case. Her cross-complaint in the ejectment suit could only have been held good upon the theory that the facts therein stated entitled her to recover the value of her inchoate interest in the property conveyed, or the value of the property which she alleged the appellees had agreed to convey to her as a consideration for the release of her inchoate interest in the property of her husband. She prayed as alternative relief that a judgment of $2,000 should be awarded her on that account. Since the agreement relied on was plainly within the statute, the cross-complaint was only good as a complaint for damages. *Cincinnati, etc., R. R. Co.* v. *Washburn*, 25 Ind. 259; *Colson* v. *Smith*, 9 Ind. 8.

Having been made a party upon her own application, and having presented for adjudication the same matters as are now presented, and a judgment having been pronounced thereon between the same parties, the matter was not open for further litigation while that judgment remained in force. *Indiana, etc., R. W. Co.* v. *Koons*, 105 Ind. 507, and cases cited. The same evidence which would have sustained a recovery on the cross-complaint would have entitled the plaintiff to recover in this case, and *vice versa*. *Brown* v. *Cain*, 79 Ind. 93.

That the judgment on the cross-complaint was finally rendered on account of the refusal of the cross-complainant to reply to the answers, does not render it any the less conclusive. *Wilson* v. *Ray*, 24 Ind. 156; *State, ex rel.*, v. *Krug*, 94 Ind. 366.

Having been afforded ample opportunity to litigate the entire subject-matter, in a case in which she presented all the facts for adjudication, the appellant is to be treated as though they were in fact litigated. *Bundy* v. *Cunningham*, 107 Ind. 360; *Baker* v. *State, ex rel.*, 109 Ind. 47.

Without regard to the question of former adjudication,

there was other evidence upon which the finding of the court may have been predicated.

There was no error. The judgment is affirmed, with costs.

Filed Dec. 20, 1887.

112	576
113	3
114	35
116	159
121	304
122	40
119	576
127	264
127	450
112	576
130	120
112	576
152	618

No. 12,671.

The City of Warsaw v. Dunlap.

Negligence.—*Evidence.*—*Presumption.*—Negligence is never presumed, and a plaintiff who alleges it as a cause of action must establish the breach of duty which constitutes the negligence or a recovery will be denied.

City.—*Obstruction in Street.*—*Liability of City.*—*Negligence.*—*Notice.*—Where an obstruction is placed on a street or sidewalk by a wrong doer, on account of which a passer-by is injured, the city can not be held liable for such injury unless it has actual notice of the obstruction, or the same has remained on such street or sidewalk such a length of time as to make it the duty of the corporate authorities to take notice of its existence.

Same.—Where an obstruction, of which the city has no notice, has been placed on a street by a third person, and is permitted to remain an hour and three-quarters, when it occasions an injury to a passer-by, the city is not guilty of negligence, and is not liable.

Same.—*Liability for Acts of Licensees.*—*Notice.*—A city is not liable for the acts of persons it licenses to use its streets, unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of its licensees.

Practice.—*Trial Without Issue.*—*Supreme Court.*—*Remedy.*—Where there is in fact no answer to a complaint, but the cause is tried upon the theory that there is an answer of general denial, the plaintiff can not, on appeal, take advantage of the absence of an answer; his remedy is by appropriate motion in the trial court.

Supreme Court.—*Reversal for Want of Evidence.*—*Practice.*—Where there is a failure of the evidence to sustain the verdict on any one material point, the judgment will be reversed on appeal.

From the Kosciusko Circuit Court.

E. Haymond and *L. W. Royse*, for appellant.

J. S. Frazer, *W. D. Frazer*, *S. P. Oyler* and *W. A. Johnson*, for appellee.

ELLIOTT, C. J.—The appellee was injured by a fall while walking along one of the streets of the city of Warsaw during the night-time, and his claim is that his fall was caused by a plank projecting across the sidewalk from the walls of a building in course of erection.

The evidence shows that the accident occurred after dark on the night of the 19th of November, 1883, and that the plank was across the sidewalk on that night. It is shown that work on the building was discontinued on the 10th of November, 1883, and resumed on the 19th day of that month. It is also shown by all the witnesses who testify on that subject, that a platform, or runway, was placed across the sidewalk on that day for the purpose of conveying bricks to the walls of the building, but all who testify on that subject assert that the planks were all removed from the sidewalk on quitting work late in the evening. There is no conflict of evidence upon this point that we can discover after a careful examination of the record.

There is a distinction between a work undertaken by the municipal corporation itself and work undertaken by another, as there is between work dangerous in itself and work not necessarily dangerous. In this instance the work was not undertaken by the corporation, nor was it dangerous in itself. It is proper and lawful for a municipal corporation to permit its streets to be temporarily used for building purposes, and, in permitting the use of its streets for building purposes, the city of Warsaw was not guilty of any actionable wrong. It could only be guilty of a wrong by omitting to use reasonable care and diligence to keep its streets free from obstructions. A municipal corporation is not an insurer of the safety of its streets, although it is bound to

exercise reasonable care and diligence to keep them in a reasonably safe condition for use. 2 Dillon Munic. Corp., section 1019. We think the evidence in this case fails to show that the city was guilty of any actionable negligence. The evidence, as we have seen, shows that the plank was removed from the sidewalk before nightfall, and the only fair inference is that it was placed across the sidewalk by some wrong-doer, and in such a case the city would not be liable. *Doherty* v. *Waltham*, 4 Gray, 596; Shearman & R. Neg., section 360.

But, if this be conceded not to be the just inference, still, the city can not be held liable, because there is no evidence of actual notice, and the time elapsing between the hour that the workmen removed the planks and that at which the accident happened was not sufficient to charge the city with notice. Where the obstruction which causes the injury is not placed in the street by the city itself, there must be actual notice, or the obstruction must have remained in the street such a length of time as to make it the duty of the corporate authorities to take notice of its existence. *City of Lafayette* v. *Blood*, 40 Ind. 62; *City of Evansville* v. *Wilter*, 86 Ind. 414; *Corporation of Bluffton* v. *Mathews*, 92 Ind. 213; *City of Madison* v. *Baker*, 103 Ind. 41; 2 Dillon Munic. Corp. (3d ed.), section 1025.

In the case before us there is really no evidence at all as to how long the plank had been across the sidewalk before the appellee fell over it; for aught that appears it may have been there for only a few minutes, and, certainly, the city could not be charged with notice under such circumstances. But, if it be granted that it was placed there immediately after the workmen left the building on the 19th of November, still, the time was not sufficient to charge the city with notice. *City of Fort Wayne* v. *De Witt*, 47 Ind. 391; *Higert* v. *City of Greencastle*, 43 Ind. 574.

In *Kunz* v. *City of Troy*, 104 N. Y. 344, it was said: "Where the question of negligence, in not removing an obstruction unlawfully placed in the street by third persons, de-

pends upon implied notice, what is a reasonable time from which notice is to be inferred, must be determined upon all the circumstances, giving weight to the consideration that municipal authorities with their multiplied duties can not be expected to act with the promptness and celerity of individuals in conducting their private affairs."

We think this is a just observation, and, applying it to the case before us, we hold that the time which elapsed between the accident and the placing of the obstruction across the sidewalk was not sufficient to authorize the jury to imply notice on the part of the municipal authorities.

The appellant filed an answer to the original complaint, but did not refile it to the amended complaint afterwards filed by the appellee. The case was, however, tried upon the theory that there was an answer of general denial, and the court so instructed the jury. It is, therefore, too late for the appellee to insist that there was no answer to his complaint. If he desired to make such a question he should have moved in the trial court for judgment on the pleadings, or in some other appropriate method have presented the question to the trial court. *Buchanan* v. *Berkshire, etc., Ins. Co.*, 96 Ind. 510, and cases cited p. 516; *Trentman* v. *Eldridge*, 98 Ind. 525; *Hartlep* v. *Cole*, 101 Ind. 458.

Judgment reversed.

Filed April 27, 1887.

On Petition for a Rehearing.

Elliott, J.—We have given the argument of the learned counsel on the petition for a rehearing careful study, and, impressed by their earnestness, have again examined the questions presented by the record.

Negligence is never presumed, and a plaintiff who alleges it as a cause of action must establish the breach of duty which constitutes the negligence or a recovery will be denied. *Wabash, etc., R. W. Co.* v. *Locke, ante*, p. 404; *Toledo, etc., R. W. Co.* v. *Brannagan*, 75 Ind. 490.

If the evidence in this case does not establish a breach of duty, the verdict is not supported, and but one conclusion is logically possible, and that is that the judgment be reversed. Again and again have judgments been reversed because the evidence did not sustain the verdict. *Cincinnati, etc., R. W. Co.* v. *Long*, *ante*, p. 166; *Crossley* v. *O'Brien*, 24 Ind. 325 (87 Am. Dec. 329); *Pittsburgh, etc., R. W. Co.* v. *Morton*, 61 Ind. 539, 581 (28 Am. R. 682); *Riley* v. *Boyer*, 76 Ind. 152; *Roe* v. *Cronkhite*, 55 Ind. 183. Failure on one material point will ensure a reversal of the judgment. *Ray* v. *Dunn*, 38 Ind. 230.

Whether a verdict is sustained by the evidence is determined by applying the law to the facts it proves, since it is obvious that, if the evidence does not bring the case within the governing legal principle, the verdict is without support.

The principle which rules this case forbids a recovery unless it affirmatively appears that the municipal corporation had notice of the unsafe condition of the sidewalk, or was chargeable with negligence in not acquiring knowledge. A broad distinction is made by all the authorities between cases where the municipal corporation itself makes a sidewalk unsafe, and cases where it is made unsafe by a wrong-doer. This case belongs to the latter class, and the municipal corporation is not liable unless it was guilty of negligence, and guilty of negligence it could not be, unless some officer or agent had actual notice of the unsafe condition of the sidewalk, or it had been so long unsafe that it was the duty of the municipal authorities to take notice of its condition.

Municipal corporations are not liable for the acts of persons it licenses to use its streets, unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of its licensees. *Ryan* v. *Curran*, 64 Ind. 345 (31 Am. R. 123); *Dooley* v. *Town of Sullivan*, *ante*, p. 451.

No liability was incurred by licensing the builders to use the sidewalks, even if it be conceded that the builders were

negligent, for, in order to make the municipality liable, evidence of the negligence of the builders must be supplemented by evidence that the city authorities were also negligent.

There is not a scintilla of evidence tending to show that any officer or agent of the city had actual notice of the obstruction of the sidewalk. If there is liability at all, it must be because the sidewalk had been so long unsafe that the municipal authorities were chargeable with notice. The question, therefore, is, does the evidence show that the city was guilty of negligence in not acquiring knowledge of the unsafe condition of the sidewalk? If the evidence fails to show that the city did not exercise ordinary care, then it fails to prove negligence, for the degree of care required of the city is ordinary care. If the evidence fails on this one essential point it defeats the case as certainly and effectually as if it failed on every point, since proof of this point is absolutely essential to a recovery.

It is shown by uncontradicted evidence that work on the building was discontinued on the 10th day of November, 1883, and recommenced on the 19th day of that month. It is also shown that planks were placed across the walk on the day last named for the purpose of a runway on which to wheel bricks. During the daytime, while in actual use, there can, of course, be no plausible pretence that there was negligence on the part of the city.

The only evidence that the plank over which the appellee fell was across the sidewalk on the night of the 19th is that it was there at about twenty minutes after six, as Miss Dodge testifies, and about six-thirty or seven o'clock, when the appellee fell over it.

The appellee's witness, Frederick Clark, testified that there was no obstruction across the sidewalk on Sunday, the day before the accident, but that it was placed there on the morning the accident happened. This witness also testified that they quit work at fifteen minutes after five o'clock, and that he thinks all obstructions were then removed. On this, the

appellee's evidence, we do not see how it is possible to maintain this verdict. Even if this evidence were not overthrown by the evidence introduced by the appellant there could be no recovery. At the most, the plank was across the sidewalk after work ceased only one hour and forty-five minutes, even if it be granted that it was left there when the workmen left the building at fifteen minutes after five o'clock. This certainly is not such a length of time as will charge the city with negligence in failing to take notice of the obstruction.

It must be kept in mind that the use of the sidewalk was a lawful one, and that this use did not make it intrinsically dangerous. As the use was neither dangerous nor unlawful, the municipality was not bound to keep constant watch over the builders. Its officers had a right, within reasonable limits, to presume that men engaged in a lawful work would do it in a lawful manner. They were not bound to anticipate negligence on the part of the men thus engaged.

In this case there was no express license granted the builders; but if there had been, the city would not have been chargeable with notice of their negligence. *Masterton* v. *Village of Mt. Vernon*, 58 N. Y. 391; *Sweet* v. *Gloversville*, 12 Hun, 302; *Dorlon* v. *City of Brooklyn*, 46 Barb. 604; *McDermott* v. *City of Kingston*, 19 Hun, 198; *Cohen* v. *Mayor of New York*, 43 Hun, 345.

It is clear, therefore, that the only ground upon which it is possible to hold the municipality liable is that the time during which the obstruction was across the sidewalk was such as to make it negligence not to acquire knowledge, and we think the brief time that elapsed, even upon the supposition that the obstruction was left on the sidewalk at fifteen minutes after five o'clock, is not sufficient to warrant the conclusion that the city was guilty of negligence in not acquiring notice.

But the concession that the builders were negligent is wholly unwarranted. George Zumbrum, James Phillpot, William Hettinger, Robert Phillpot, Thomas Goodall and

William Kirtley, workmen engaged in the erection of the building, testify that there was a platform erected across the sidewalk on the morning of November 19th, and that it was taken away on quitting work. Two or more of these witnesses testified that they assisted in taking it away, and that no obstructions were left on the walk.

William Kirtley swore that he was the landlord of the American House, situated three doors distant from the Hotel Hayes, the building in process of erection, and that the platform was taken down on quitting work on the evening of the 19th of November. We can not yield to counsel's contention that the jury were at liberty to disregard this positive testimony, for the only thing that has even the semblance of a contradiction is that there was a plank across the sidewalk about an hour and fifteen minutes after the workmen left the building. *Cincinnati, etc., R. W. Co.* v. *Long, supra; Palmer* v. *Chicago, etc., R. R. Co., ante,* p. 250.

The fair and reasonable inference is that these men told the truth, and that some wrong-doer placed the plank across the walk. If the obstructions were all removed on quitting work near nightfall, there was, under the authorities cited in our former opinion, no negligence. *Dooley* v. *Town of Sullivan, supra.*

Petition overruled.

Filed Dec. 10, 1887.

112 524
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150 693

No. 13,692.

Bottles et al. v. Miller.

Pleading.—*Reply.*—*Must be Responsive.*—A reply which does not respond to all the paragraphs of answer to which it is addressed is bad on demurrer.

Statute of Limitations.—*Promissory Note.*—*Partial Payment by One Joint Maker.*—*Effect as to Others.*—A payment upon a promissory note by one joint and several maker will not defeat the operation of the statute of limitations as to any other maker, nor deprive the latter of his right to avail himself of the statute as a defence.

Same.—*Mortgage.*—*Non-Residence.*—*Insolvency.*—Where, in an action upon a note and mortgage, one of four joint and several makers answers the twenty years statute of limitations, a reply alleging the death and insolvency of two, and a partial payment by the third prior to the running of the statute, after which the latter had left the State, and still continued to be a non-resident, is bad.

Same.—*Debt not Barred, Mortgage not Barred.*—A payment upon a note secured by mortgage, if sufficient to take the note out of the operation of the statute of limitations, will have a like effect upon the mortgage; and, so long as any part of the debt remains unpaid and not barred, the lien of the mortgage continues unimpaired.

From the Harrison Circuit Court.

W. Cook, C. N. Cook and *W. Ridley*, for appellants.

B. P. Douglass and *J. L. Suddarth*, for appellee.

Howk, J.—This suit was commenced by appellee, as sole plaintiff, against appellants and a number of other persons, as defendants, on the 12th day of February, 1883. Appellee's complaint counted upon a promissory note for $287.50, dated April 18th, 1859, and payable twelve months after date to the order of appellee, and, also, a mortgage alleged to have been executed on the same date by the defendants to the plaintiff herein, on certain real estate in Harrison county, Indiana, to secure the payment of such note. The cause was put at issue and heard by the court, and a finding was made for appellee substantially in accordance with the prayer of his complaint; and, over the separate motions of the

appellants, Bottles and Keller, for a new trial or hearing herein, the court rendered judgment and decree for appellee upon and in accordance with its finding herein.

In this court, appellants, Bottles and Keller, have separately assigned a number of errors, and these errors we will consider, and decide the questions thereby presented, in the same order in which their counsel have discussed them in their elaborate brief of this cause. We may premise that the defence relied upon by each of the appellants in their separate pleadings herein was the statute of limitations, or, in other words, that the cause of action stated in appellee's complaint did not accrue within twenty years prior to the commencement of this suit.

The first error complained of here by appellant Eliza Bottles is the overruling of her separate demurrer to the first paragraph of appellee's reply to the second, third and fourth paragraphs of her separate answer herein. Appellee's complaint counted, as we have said, upon a joint and several promissory note for $287.50, purporting to have been executed on the 18th day of April, 1859, by appellants John Keller and Eliza Bottles, and by Rebecca Keller and Jacob Bottles, and to have been made payable twelve months after date to the order of William J. Miller, appellee here and plaintiff below, and also upon a mortgage purporting to have been executed and acknowledged by the makers of such note, and recorded in the proper recorder's office on the same date therewith, and to secure the payment thereof. In her second paragraph of answer appellant Eliza Bottles said that the cause of action stated in appellee's complaint did not accrue within twenty years next before the commencement of this action; in the third paragraph of her separate answer she alleged that appellee's cause of action for the foreclosure of the mortgage sued upon did not accrue within such twenty years; and in the fourth paragraph of her separate answer she averred that appellee's cause of action upon the note in

suit did not accrue within the twenty years next before the commencement of this action.

In the first paragraph of his reply to the second, third and fourth paragraphs of the separate answer of Eliza Bottles, appellee, Miller, alleged that at the time she executed the note sued upon Eliza Bottles was a married woman, and such note as to her was void; that Jacob Bottles afterwards died, and left no estate out of which any part of such note could be made, and Rebecca Keller had since died, leaving no property out of which any part of such note could be made; that, before the expiration of the twenty years, to wit, on the 17th day of April, 1879, John Keller made a payment on the note in suit, and, shortly afterwards, left the State of Indiana, and had been at all times since a non-resident of this State.

In his second paragraph of reply to the second, third and fourth paragraphs of Eliza Bottles' separate answer, appellee, Miller, averred that, at the time Eliza Bottles signed the note in suit, she was a married woman, and was not personally liable on such note; that afterwards Jacob Bottles and Rebecca Keller, makers of such note, both died, leaving no property out of which any part of the note could be made; and that, before twenty years had expired from the time appellee's cause of action had accrued, John Keller left the State of Indiana and became a non-resident of this State, and had since continued to be a non-resident thereof.

Appellant Eliza Bottles demurred to each of these replies, upon the ground that it did not state facts sufficient to constitute a good reply to the second, third and fourth paragraphs of her separate answer herein. These demurrers were each overruled by the court below, and these rulings constitute the first and second errors whereof complaint is here made by and on behalf of appellant Eliza Bottles.

We are of opinion that the court below clearly erred in each of the rulings complained of, and that the facts stated by appellee in either paragraph of his reply did not, and

could not, in the nature of things, defeat or stay the operation of the statute of limitations pleaded and relied upon by Eliza Bottles, in each of the second, third and fourth paragraphs of her separate answer, as an absolute bar of appellee's supposed cause of action against her, founded on the note and mortgage described in his complaint herein. Under the code, each of such replies was clearly bad on the demurrer thereto, because, as we have often held, it did not respond to all the paragraphs of answer to which the reply on its face was addressed. Thus, the replies were addressed to the second, third and fourth paragraphs of the separate answer of Eliza Bottles.

In such second paragraph of her answer she pleaded the statute of limitations in bar of appellee's action upon both the note and mortgage sued upon, and in the fourth paragraph of such answer she pleaded the statute in bar only of his action upon the mortgage in suit. But in appellee's replies, although each of them on its face purports to reply to the second, third and fourth paragraphs of such answer, there was no attempt even, in either of such replies, to respond or reply to so much of such paragraphs of answer as pleaded the statute of limitations in bar of appellee's action on the mortgage in suit. Clearly, therefore, under the rule of pleading hereinbefore stated, each of such replies was insufficient, and it was error in the court below to overrule the demurrers thereto. *Smith* v. *Little*, 67 Ind. 549; *Douch* v. *Bliss*, 80 Ind. 316; *McCaslin* v. *State, ex rel.*, 99 Ind. 428, on p. 441; *McLead* v. *Ætna Life Ins. Co.*, 107 Ind. 394.

Aside from this rule of pleading, however, we are of opinion that the facts stated by appellee in each of his replies were wholly insufficient to take appellee's cause of action, as against appellant Eliza Bottles, without the operation of the statute of limitations pleaded by her in bar of his action. It is a little difficult to comprehend the theory of appellee's replies; but, surely, it is not the law that the small payment made on the note in suit by one of the four joint and several

makers thereof will stay the running of the statute, and defeat its operation as a defence in bar of the cause of action as to the others of such joint and several makers of such note. Such payment was at most only *prima facie* evidence of a new or continuing contract or promise by the payor of the money to pay the note in suit. *Willey* v. *State, ex rel.*, 105 Ind. 453.

It can not be correctly said, we think, that this new or continuing contract or promise to pay the note sued upon, evidenced *prima facie* by the payment on such note, is binding on any one except the maker of such payment. In section 302, R. S. 1881 (substantially a re-enactment of section 221 of the civil code of 1852), it is provided that "The acknowledgment or promise of one joint contractor * * * shall not render any other joint contractor * * * liable under the provisions of this act." Section 303, R. S. 1881 (a re-enactment of section 223 of the civil code of 1852), reads as follows: "Nothing contained in the preceding sections shall take away or lessen the effect of any payment made by any person; but no endorsement or memorandum of any payment made upon any instrument of writing, by or on behalf of the party to whom the payment shall purport to be made, shall be deemed sufficient to exempt the case from the provisions of this act." Construing this section of the statute in connection with the "preceding sections" therein mentioned, as we think we may, it must be held that payment by one joint and several promisor will not defeat the operation of the statute of limitations as to any other joint and several promisor, nor deprive the latter of his right to avail himself of the statute as a defence in bar of an action on the promise.

We are of opinion, also, that the other facts averred by appellee in his replies, to the effect that two of the makers of the note and mortgage in suit had died, leaving no property, and that John Keller, another maker of such note and mortgage, before the expiration of twenty years after appel-

lee's cause of action accrued, had become and had since continued to be a non-resident of this State, were wholly insufficient in themselves, or in connection with the payment made by John Keller as pleaded in the first reply, to avoid the second, third and fourth paragraphs of the separate answer of Eliza Bottles. It seems to us, therefore, that these replies were clearly insufficient, and that the demurrers thereto ought to have been sustained. This conclusion renders it unnecessary for us to consider now the remaining error assigned by appellant Eliza Bottles upon the overruling of her separate motion for a new trial.

We pass now to the consideration of the errors separately assigned by appellant John Keller, namely: 1. Error of the court below in overruling his demurrer to the second paragraph of appellee's answer to his cross-complaint herein; and 2. Error of the court in overruling his separate motion for a new trial.

In his cross-complaint appellant John Keller alleged that he was the owner of certain parts, particularly described, of the real estate covered by the mortgage in suit herein; and he admitted that he executed such mortgage, but he averred that, since its execution, he and his co-defendant, Eliza Bottles, made an amicable partition of the mortgaged real estate, whereby the parts thereof, thereinbefore described, were assigned and set off to him in severalty as his full one-half of such mortgaged real estate, and, in pursuance of such partition, he took and had since continued in the possession of the real estate so set off to him; that the remainder of such mortgaged real estate was assigned and set off to his co-defendant, Eliza Bottles, who in pursuance of such partition took possession thereof; that he executed the mortgage sued upon, but he averred that the cause of action, described in appellee's complaint herein, did not accrue within twenty years next before the commencement of this action; that appellee's cause of action to foreclose such mortgage accrued on the 19th day of April, 1860, and such cause of action was

barred on the 20th day of April, 1880; that appellant John Keller never made any payment upon the note or debt which such mortgage was given to secure, nor any payment of interest thereon, nor had he ever made any new acknowledgment of such debt in any manner; that this suit to foreclose such mortgage was not commenced until the 12th day of February, 1883; and that, by reason of the premises, such mortgage had become and was, at the commencement of this suit, barred by the statute of limitations, and was an invalid and void lien on John Keller's real estate thereinbefore described, and was a cloud upon his title thereto. Wherefore, etc.

In the second paragraph of his answer to John Keller's cross-complaint, appellee averred that, on the 17th day of April, 1879, and before the expiration of twenty years from the time his cause of action in suit herein became due and payable, defendant and cross-complainant, John Keller, paid to appellee and plaintiff, William J. Miller, the sum of five dollars upon the note and mortgage in suit, which payment was entered of that date as a credit upon such note.

John Keller's demurrer to this second paragraph of appellee's answer, upon the ground that it did not state facts sufficient to constitute a defence to his cross-complaint herein, was overruled by the court, and this ruling is the first error of which he complains here in argument.

The gist or substance of John Keller's cross-complaint is, that appellee's note and mortgage in suit, before he commenced this suit, were absolutely barred by the provisions of the *fifth* clause of section 210 of the civil code of 1852, which remained in force until the 19th day of September, 1881, when more than twenty years had expired after the cause of action sued on had accrued, and that such mortgage, therefore, was a cloud upon his title to his one-half of the mortgaged real estate. It is claimed by John Keller's learned counsel that the payment of part of a note or debt secured by a mortgage on real property, which would take the note

or debt out of the operation of the statute of limitations, will not have the like effect upon the mortgage given to secure the payment of such note or debt. If this claim of counsel were correct, it might possibly be maintained that appellee's answer to John Keller's cross-complaint was insufficient, and that the demurrer thereto ought to have been sustained. We are of opinion, however, that the claim of Keller's counsel on the question we are now considering is wholly unsound, and, under our law, can not be sustained. In this State the debt secured is the principal thing, while the mortgage security is but an incident of the debt. Payment of the debt will satisfy the mortgage, and the extinguishment of the debt will destroy the vitality of the mortgage. It is well settled by our decisions, however, that neither an extension of the time of payment, nor a change in the form of a debt secured by mortgage, will defeat or even impair the lien of the mortgage. *McCormick* v. *Digby*, 8 Blackf. 99; *Dumell* v. *Terstegge*, 23 Ind. 397 (85 Am. Dec. 466); *People's Savings Bank* v. *Finney*, 63 Ind. 460; *Bodkin* v. *Merit*, 86 Ind. 560; *Shuey* v. *Latta*, 90 Ind. 136.

Part payment of a note or debt, secured by mortgage, may, and often does, extend the time of payment of such note or debt beyond the date when the same would have been, if no such payment had been made, completely barred by the statute of limitations. It will not do to say, we think, that such an extension of the time of payment of the note or debt will of itself defeat or impair the lien of the mortgage security. Even the merger of the note or debt in a judgment, it has often been held, will not defeat or impair the lien of the mortgage security. *Lapping* v. *Duffy*, 47 Ind. 51; *Teal* v. *Hinchman*, 69 Ind. 379; *Pence* v. *Armstrong*, 95 Ind. 191; *Curtis* v. *Gooding*, 99 Ind. 45.

We are of opinion, therefore, that a mortgage on real estate, unless it has been released or satisfied by the mortgagee or his assigns, will remain a continuing security and may be enforced, without regard to lapse of time, so long as any part

of the debt secured thereby remains unpaid and is not barred by the statute of limitations. The demurrer to the second paragraph of appellee's answer to Keller's cross-complaint was correctly overruled.

We do not now consider the other error assigned by Keller. As the judgment must be reversed for the errors against Mrs. Bottles heretofore pointed out, we think that the interests of all the parties require the reversal of the entire judgment.

The judgment is reversed, with costs, etc.

Filed Dec. 22, 1887.

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113	563
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116	459
118	11
129	540
112	592
124	269
124	398
112	599
129	330
119	592
130	247
112	592
131	266
119	592
137	910
138	604
112	592
113	386

No. 12,015.

The Lake Shore and Michigan Southern Railway Company v. Pinchin.

Negligence.—*Railroad.—Attempt to Pass Between Cars.—Personal Injury.—Contributory Negligence.*—One who attempts to pass between the coupled cars of a freight train standing temporarily across a street, at a way station, and either knows or might know by using his natural faculties that the train is likely to move at any moment, is guilty of such contributory negligence as bars a recovery for an injury sustained by the starting of the train.

Same.—*Direction of Brakeman.—Obvious Danger.*—The direction of a brakeman to a person to pass between the cars of a train standing on a highway will not justify him in attempting to do so, where the danger is obvious.

From the DeKalb Circuit Court.

J. I. Best, A. Pond and *O. G. Getzen-Danner*, for appellant.
J. E. Rose and *A. A. Chapin*, for appellee.

Elliott, J.—The facts found by the jury in answer to

interrogatories are substantially these: The appellee was injured while attempting to pass between two coal cars forming part of a train standing across a street in the town of Butler. He knew that the train was a through freight, bound west, and on approaching the train he stopped to the south of it five or six feet and stood there from five to eight minutes before he attempted to pass between the cars. He did not know that an engine was attached to the train, but he did not go towards the head of the train to see whether there was an engine attached. When the appellee got up between the cars he stood on the draw-bars, and at the time he was injured "had his hands bracing himself between the cars." At the time he attempted to pass between the cars he had an open pocket-knife and a cane in his hands, and was whittling a stick. The knife and stick were laid on the end of one of the cars when he got upon them. In his effort to pass between the cars he raised his foot and put or got it on the end of the draw-bars on which he had been standing. After he got up between the cars he picked up his knife, shut it up and put it in his pocket. The cars were moving fast enough for him "to have noticed that the train was in motion had he been giving attention to the movement." No notice was given by him of his intention to pass through the train to any of the trainmen, and none of them knew that he was going to make the attempt. A man could, by looking, have seen the engine of the train. The appellee knew before he attempted to cross that the train had broken in two. He would not have made the attempt "except for what a man he took to be a brakeman told him."

There are cases where the court must, as a matter of law, declare that an act constitutes negligence. When the facts are undisputed, and lead to but one inference, the question whether there was, or was not, negligence is a question of law. *Pittsburgh, etc., R. R. Co.* v. *Spencer*, 98 Ind. 186. This is such a case. It must be affirmed, as matter of law,

on the facts exhibited in the answers of the jury, that the appellee was guilty of negligence in attempting to pass between the cars, and in the manner in which he undertook to carry out the attempt. He knew the train was not to remain in the town, but was there on its trip westward, and he knew that it had broken in two, so that, even if he was not negligent in making the attempt to cross, he was negligent in the manner in which he conducted himself in making his way between the cars. If it were conceded that he was without fault in endeavoring to pass through the train, still it must be held that he was negligent in not exercising a higher degree of care in effecting what no reasonable man could avoid knowing was a dangerous passage between the cars. He was burdened with things that interfered with his safely clambering through the train. He made no haste, but laid the things he had in his hands on the end of one of the cars, and before leaving his dangerous position picked them up and put one of them in his pocket. This was not such care as was required, even had he been crossing with permission of the railroad company and without fault. It by no means follows that because a man may do an act he may do it carelessly. But we need not place our decision upon the ground that the manner in which the appellee attempted to cross between the cars made him guilty of contributory negligence, for he was guilty of negligence in making the attempt. There was, therefore, negligence in entering upon the act as well as in the manner of performing it. A person who has knowledge that a train of cars is stopping temporarily at a way station on its way to its destination, has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it. *Rauch* v. *Lloyd*, 31 Pa. St. 358; *Memphis, etc., R. R. Co.* v. *Copeland*, 61 Ala. 376; *Stillson* v. *Hannibal, etc., R. R. Co.*, 67 Mo. 671; *Lewis* v. *Baltimore, etc., R. R. Co.*, 38 Md. 588; *Haldan* v. *Great Western R. W. Co.*, 30 U. C. C. P. 89.

It will not avail the plaintiff that he was not fully aware of his danger, for a plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man. *Pennsylvania R. R. Co.* v. *Henderson*, 43 Pa. St. 449; *Southern R. R. Co.* v. *Kendrick*, 40 Miss. 374.

A man must use his senses, and is not excused where he fails to discover the danger if he has made no attempt to employ the faculties nature has given him. 2 Wood R. W. Law, 1319, n. 2; *Toledo, etc., R. W. Co.* v. *Goddard*, 25 Ind. 185.

One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence. But here the case is stronger, because the fact is, that the appellee might have known by observation or "by feeling" that the train was actually in motion when he attempted "to get down."

The fact that a plaintiff has knowledge of a danger that he will encounter if he pursues his way does not always necessarily preclude a recovery, but it is in every case an important factor. *Toledo, etc., R. W. Co.* v. *Brannagan*, 75 Ind. 490, and cases cited; *City of Huntington* v. *Breen*, 77 Ind. 29; *Murphy* v. *City of Indianapolis*, 83 Ind. 76; *Wilson* v. *Trafalgar, etc., G. R. Co.*, 83 Ind. 326; *Henry County T. P. Co.* v. *Jackson*, 86 Ind. 111; *Nave* v. *Flack*, 90 Ind. 205 (46 Am. R. 205); *Town of Albion* v. *Hetrick*, 90 Ind. 545 (46 Am. R. 230); *Board, etc.*, v. *Dombke*, 94 Ind. 72; *City of South Bend* v. *Hardy*, 98 Ind. 577 (49 Am. R. 792); *City of Indianapolis* v. *Cook*, 99 Ind. 10; *City of Aurora* v. *Bitner*, 100 Ind. 396; Beach Con. Neg. 40, 258.

But the fact that the danger is known, or might be known by the exercise of the natural faculties, will preclude a recovery where it is immediate, and of such a character as to impose upon one who undertakes to pass the danger a hazard

that a prudent man would not incur. A man has no right to cast himself upon a known danger where the act subjects him to great peril. If there is a risk apparent or known that will probably result in injury, he must not encounter it. *Toledo, etc., R. W. Co.* v. *Brannagan, supra.*

It is to be determined from the facts of the case whether the known danger is likely to subject the plaintiff to injury, and if it is, then he must be held guilty of negligence in encountering it. While, therefore, it can not be held that one who does not go out of his way to avoid a known danger is not always guilty of contributory negligence, yet it must be held that he is guilty of negligence where he attempts to pass the danger where there is such a probability of injury as would deter a reasonable man from assuming the risk of passing it. If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will preclude a recovery. *Town of Gosport* v. *Evans, ante,* p. 133.

In this case the risk of passing between a train of cars, likely to get under way at any moment, was such as no one could assume without being guilty of negligence. This is one of the cases where it must be declared, as matter of law, that the risk is so great that no one who has a knowledge of the danger has a right to assume it.

The direction of a brakeman to a person to pass through a train standing on a highway will not justify him in attempting to pass between the cars where the danger is obvious. Even in the case of passengers, obedience to the directions of the conductor will not avail the passenger if the danger of obedience is plainly apparent. In that class of cases, as is well known, the passenger has much greater claims to protection than a traveller along a highway, and yet the overwhelming weight of authority is that the passenger can not rely upon the conductor's directions where they would lead him into danger plainly open to observation.

In the case of *Cincinnati, etc., R. R. Co.* v. *Carper, ante,* p. 26, the authorities on this subject are collected, and it is unnecessary for us to again consider them.

One important fact found in favor of a defendant may sometimes entitle him to a judgment on the answers of the jury to special interrogatories. It is apparent, therefore, that a defendant may obtain a judgment with less difficulty than a plaintiff who has the burden of proof. *Rice* v. *City of Evansville,* 108 Ind. 7 (58 Am. R. 22).

In the present case the answers find in favor of the defendant the important facts that the plaintiff attempted to pass through the cars of a train which he knew might move in an instant after he got upon them, and that in the attempt he did not use due care. The question was presented in a case very like the present in principle, upon answers to interrogatories, and it was held that the defendant was entitled to judgment on the answers. *Thompson* v. *Cincinnati, etc., R. R. Co.,* 54 Ind. 197.

Judgment reversed and cause remanded, with instructions to enter judgment for the appellant on the answers to interrogatories.

MITCHELL, J., did not take part in the decision of this [redacted].

Filed Oct. 20, 1887; petition for a rehearing overruled Dec. 20, 1887.

119 598
115 440

No. 12,286.

The White Water Railroad Company *v.* Butler.

Railroad.—*Passenger.—Right to be Discharged at Depot.—Liability of Carrier for Ejecting at Another Place.*—A passenger has a right to be discharged at the regular depot of the carrier, and if ejected at another place the carrier is liable.

From the Rush Circuit Court.

L. W. Florea, G. C. Florea, F. J. Hall, J. Q. Thomas and *J. J. Spann*, for appellant.

G. F. O'Byrne, W. H. Jones, C. F. Jones, J. F. McKee and *D. W. McKee*, for appellee.

Elliott, J.—There is evidence in proof of these facts: The appellee bought a ticket entitling her to be carried as a passenger from Brookville to Metamora over the appellant's railroad. She took passage in a train which carried both freight and passengers, and which, under the rules of the company, stopped at Metamora to receive and discharge passengers. At that place there was a depot at which passengers were received and discharged, and at which the trains usually stopped for that purpose. The train which the appellee entered did not stop at the depot, but did stop on a switch or side-track, and remained there long enough to allow another train to pass. The name of the station was not called, nor was any invitation given to passengers to alight. The train drew out from the switch, moved on past the depot, and when it had gone about one-half mile beyond Metamora the appellee was ejected.

These facts entitled the appellee to a recovery. It was the duty of the carrier to stop at the depot where passengers were usually received and discharged. A right to be carried from one regular station to another includes the right to a safe alighting place at the depot of the carrier kept and used for that purpose. A person buying a ticket entitling him to

passage to a town or city can not be required to alight at any part of the town or city it may please the carrier to stop, but he is entitled to be carried to the regular depot of the carrier. The carrier's duty is not discharged when an opportunity is offered the passenger to alight alongside of a switch or side-track distant from the usual and regular alighting place.

A text-writer thus states the rule: "The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping; and in an old case it was held, that when such usual place was an inn-yard, it was not sufficient to put him down outside of the gateway of the inn." Hutchinson Carriers, section 612. The authorities fully support the author's statement of the law. *Terre Haute, etc., R. R. Co.* v. *Buck*, 96 Ind. 346 (49 Am. R. 168).

It is probably true that a railroad company may make a distinction between trains employed exclusively in transporting passengers and those employed in carrying both freight and passengers, and require passengers on the latter trains to alight at a safe place other than the regular depot; but unless a distinction is made the passenger has a right to be carried to the regular depot. We decide this case, as the evidence fully warrants us in doing, upon the theory that no distinction was made between the two kinds of trains, and, proceeding on this theory, adjudge that it was the appellant's duty to stop at the regular depot a sufficient length of time to allow the appellee to alight in safety.

Judgment affirmed.

Filed Dec. 29, 1887.

No. 12,999.

WOOLS *v.* THE FIRST NATIONAL BANK OF JEFFERSONVILLE.

From the Clark Circuit Court.

J. G. Howard, J. F. Read, M. Z. Stannard and *A. Dowling*, for appellant.

J. K. Marsh and *Brown, Humphrey & Davis*, for appellee.

MITCHELL, C. J.—This case is in all material respects like that of *McCann v. First Nat'l Bank of Jeffersonville*, *ante*, p. 354. Upon the authority of that case the judgment of the Clark Circuit Court is affirmed, with costs.

Filed Dec. 1, 1887.

No. 12,815.

THE STATE, EX REL. COHEN ET AL., *v.* BROWN ET AL.

From the Daviess Circuit Court.

W. R. Gardiner, S. H. Taylor, N. Morris and *L. Newberger*, for appellants.

J. Baker, for appellees.

MITCHELL, C. J.—This was a suit by the State, on the relation of Cohen and others, against Brown, and the sureties on his official bond, as trustee of Washington township, in Daviess county.

The facts averred in the complaint are in no wise different from those involved in *State, ex rel. Cohen*, v. *Hawes*, *ante*, p. 323. On the authority of that case, and for the reasons therein given, the judgment is affirmed, with costs.

Filed Dec. 10, 1887.

No. 13,024.

WISMAN ET AL. *v.* MCGEE, TREASURER, ET AL.

From the Tipton Circuit Court.

M. Bell and *W. C. Purdum*, for appellants.

R. B. Beauchamp, G. H. Gifford and *C. W. Swain*, for appellees.

HOWK, J.—The questions presented for decision by the record of this cause and appellants' assignment of error thereon are substantially the same as those which were considered and decided by this court in *Trimble v. McGee*, *ante*, p. 307. This cause is decided, therefore, in the same way and for the same reasons as the case cited was decided.

The demurrer to the complaint herein was correctly sustained.

The judgment is affirmed, with costs.

Filed Nov. 30, 1887.

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13. *Same.—Evidence.—Communication of Threats.*—In a trial for arson the admission of evidence that threats made by a defendant, not on trial, had been communicated to the owner of the property alleged to have been burned, is erroneous. *Ib.*

14. *Witness.—Cross-Examination.—Collateral Questions.—Interest or Hostility of Witness.—Contradiction.*—Where a witness is cross-examined on a matter collateral to the issues, his answer can not be subsequently contradicted by the party putting the question; yet where the question on cross-examination goes to the interest of the witness or his hostility to one of the parties, and he denies such interest or hostility, he may be contradicted by evidence of his own statements, or other implicative acts. *Ib.*

15. *Same.*—Where, in a trial for arson, a witness on cross-examination denies having made hostile declarations concerning the owner of the property alleged to have been burned, it is competent for the cross-examining party to introduce evidence that such declarations were made. *Ib.*

16. *Brothel.—Taking Infant Female to.—Procuring Her to Have Intercourse With Men.*—One who takes his daughter, under eighteen years of age, to a brothel and instructs or commands her to have sexual intercourse with men who visit the place, which she does, is guilty of the offence prescribed by section 2001, R. S. 1881. *Stevens* v. *State*, *433*

CURATIVE STATUTE.

See NEW TRIAL, 1.

DAMAGES.

See CONTRACT; EVIDENCE, 9; GUARANTY, 5; PROMISSORY NOTE, 10.

1. *Measure of.—Breach of Contract.—Gains and Profits.*—A party who has been wrongfully deprived of the profits of an executory contract may recover, by way of damages, the difference between the amount he would have been entitled to on performance and the amount it would have cost him to perform the contract.
Cincinnati, etc., R. W. Co. v. *Lutes*, *276*

2. *Same.—Procurement of Other Work.—Reduction of Damages.—Burden of Proof.*—In such case the burden is upon the defendant to prove that the plaintiff could have procured other work, from which profits would have accrued, thereby preventing or reducing the damages for which he sues. *Ib.*

8. *Negligence.—Interruption of Business.—Profits as an Element of Damages.*—Where an established business of a permanent character, as a mill for the manufacture of grain into meal, hominy or the like, is suspended by an overflow, and machinery used therein so injured that in order to make repairs a cessation of business is necessary, the net earnings or profits of the present and past are competent to be considered by the jury in estimating the owner's damages during the period that his business is so interrupted. *City of Terre Haute* v. *Hudnut*, *542*

DEBTOR AND CREDITOR.

See BANKRUPTCY; CONTRACT, 6; FRAUDULENT CONVEYANCE; LABORERS AND EMPLOYERS; PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

DECEDENTS' ESTATES.

See APPEAL; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PROMISSORY NOTE, 2; VENDEE'S LIEN; WILL.

1. *Notice of Pendency of Final Settlement.—Requirements of.*—The notice of the time fixed for the hearing of an executor's or administrator's final settlement, required by sections 23 and 26 of the act of March 7th, 1883 (Acts 1883, p. 160), may be signed by the clerk of the court in which the matter is pending, and is not insufficient if it recites that it is "to the heirs, creditors and legatees," instead of "to all persons interested in said estate." *Roberts v. Spencer, 81*

2. *Same.—Claims.—When Barred.—Statute Construed.—Exceptions to Final Settlement Report.—Practice.*—Under the provisions of section 5 of the act of March 7th, 1883 (Acts 1883, p. 151), a claim against a decedent's estate will be barred if not filed at least thirty days before the filing of the final settlement report by the executor or administrator, subject to the exceptions of that section, and exceptions to such final settlement, filed by a creditor, based on the ground that he has a valid claim against such estate, which has not been filed within the time provided by statute, no excuse for the delay being set forth, and no fraud on the part of the executor being alleged, should, on motion, be stricken out. *Ib.*

3. *Statute Construed.*—The phrase "final settlement of the estate," as used in the last sentence of section 2310, R. S. 1881, and section 5 of the act of March 7th, 1883 (Acts 1883, p. 154), means the filing of the account of the executor or administrator for final settlement, and claims not filed thirty days before such filing at a time and in the manner authorized by law will be barred. *Roberts v. Spencer, 85*

4. *Same.—Claim.—Showing of Excuse for not Filing.*—For facts held to be insufficient to excuse a claimant for not filing his claim against an estate, so as to relieve him from the provisions of the statute under which such claim is barred, see opinion. *Ib.*

5. *Costs Taxed Against Administrator Personally.—When a Charge Against Estate.*—Where an administrator is sued in his individual capacity for the recovery of personal property of which he has taken possession in his representative capacity, believing it to belong to the decedent's estate, the costs which he incurs, in good faith, in defence of the suit, and which are taxed against him personally, are a proper charge against the estate. *Muckey v. Ballou, 198*

6. *Same.—Resisting Allowance.—Party in Interest.*—One who has purchased real estate which, there being no personal property, is liable to be sold by the administrator to make assets to pay an allowance, if it is a legal charge against the estate, has such an interest as gives him a right to contest its validity. *Ib.*

7. *Same.—Estoppel.—Vendor and Purchaser.*—Neither the fact that his vendor is solvent, thereby giving him a remedy upon his covenant of warranty, nor that the vendor agreed to pay the claim for which the allowance is asked, prevents the purchaser from resisting the claim; but if the latter agreed with his vendor to pay it, and for that purpose retained a part of the purchase-money, he is estopped to dispute its validity. *Ib.*

8. *Claims.—Complaint.—Requirements of.*—Under the statute a formal complaint is not required in presenting a claim against a decedent's estate, but it is necessary that there shall be such a statement of facts as will show a legal liability on the part of the estate, and as will, with reasonable certainty, indicate to the representative of the estate what he is called upon to meet. *Culver v. Yandt, 401*

9. *Same.—Judgment.—Insufficient Complaint Upon.*—Where the claim filed against the estate of a decedent is founded upon a judgment against a gravel road company, and no facts are stated showing that the decedent was in any way a party to or interested in the judgment, other than the statement that one-seventh thereof is the proportionate share of the decedent, it is insufficient on demurrer. *Ib.*

10. *Pleading Special Defences.—Demurrer.—Practice.*—Under section 11 of the act of March 7th, 1883 (Acts of 1883, p. 156), an administrator may prove any defence to a claim, except a set-off or counter-claim, without special plea; but where a special defence is pleaded, it may be tested by a demurrer, as in other cases, and error in ruling upon the demurrer is available as in other cases. *Custetter* v. *State, ex rel.*, *445*

DEED.

1. *Covenant of Seisin.—Law Governing.*—Where a deed is made in this State purporting to convey land in another State, the question as to whether it contains the covenant of seisin is determined by the law of this State. *Jackson* v. *Green*, *341*

2. *Same.—Short Form.—Covenants Embraced in.*—Under the statute of this State, the words "convey and warrant" comprehend and express all the covenants of warranty as fully as if they were written out at length in the deed. *Ib.*

3. *Same.—Breach of Covenant of Seisin.*—Where a grantor has neither title nor possession, the covenant of seisin is broken as soon as the deed is executed. *Ib.*

4. *Same.—Special Covenant.—Limitation of General.*—A special covenant "now and forever warranting and defending the said premises against all taxes against us, and against our own acts in the premises," limits the general covenants against encumbrances and for quiet enjoyment, but not the general covenant of seisin. *Ib.*

DELIVERY.

See CHATTEL MORTGAGE, 3; CONTRACT, 1; GUARANTY, 2; PROMISSORY NOTE, 6.

DEMAND.

See EXECUTION, 2.

DEMURRER TO EVIDENCE.

1. *Truth of Facts.—Inferences.—Practice.* In considering a demurrer to evidence, the court is bound to accept as true all the facts which the evidence tends to prove, and, as against the demurring party, to draw from the evidence all such reasonable inferences as a jury might draw. *Palmer* v. *Chicago, etc., R. R. Co.*, *250*

2. *Same.—Conflicting Evidence.—What Can be Considered.*—If there is a conflict in the evidence, then only such as is favorable to the party against whom the demurrer is directed can be considered, and that which is favorable to the demurring party is deemed to be withdrawn. *Ib.*

3. *Same. Question Presented.—Bill of Exceptions.* Where evidence is incorporated, as it must be, in the demurrer, the only question presented is the sufficiency of the evidence to sustain a right of action, and exceptions to rulings in rejecting or receiving evidence are not presented, a bill of exceptions being necessary for that purpose. *Ib.*

DESCRIPTION.

See CHATTEL MORTGAGE, 7.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; MARRIED WOMAN; MORTGAGE, 1 to 3; PARENT AND CHILD.

DRAINAGE.

See CRIMINAL LAW, 4; INJUNCTION, 3; JUDGMENT, 14, 15; TRESPASS.

1. *Repairs by Township Trustee.—Constitutionality of Statute.*—Section 7 of the act of March 8th, 1883, amending section 10 of the act of April 8th, 1881 (section 4282, R. S. 1881), requiring township trustees to keep public drains in repair, etc., is constitutional.
Trimble v. *McGee, 307; Wiman* v. *McGee, 600*

2. *Same.—Appeal.—Injunction.*—Where persons whose lands are assessed by the township trustee as benefited have notice of the assessments in time to appeal therefrom to the circuit court, where they can obtain all the relief which the statute contemplates, but fail to do so, they can not afterwards, in a suit for an injunction, obtain such relief. *Ib.*

3. *Same.—Complaint for Injunction.—Insufficiency of.*—For a complaint to enjoin a county treasurer from collecting assessments levied upon lands by a township trustee to reimburse the township for money paid out for repairing and removing obstructions from public ditches, which is held insufficient to obtain equitable relief, see opinion. *Ib.*

DRAINAGE COMMISSIONER.

See CRIMINAL LAW, 4; TRESPASS.

EJECTMENT.

See APPEAL BOND.

EMBEZZLEMENT.

See CRIMINAL LAW, 3, 4.

ESTOPPEL.

See CHATTEL MORTGAGE, 9, 10; DECEDENTS' ESTATES, 7; GRAVEL ROAD, 1; GUARANTY, 2; GUARDIAN AND WARD; INSURANCE, 2; JUDGMENT, 6, 8, 16; JURY, 2; MARRIED WOMAN, 1; MUNICIPAL CORPORATION, 6, 7; PARENT AND CHILD, 1; PROMISSORY NOTE, 4.

Facts Constituting Must be Pleaded.—The facts constituting an estoppel must be pleaded.
Fleener v. *Claman, 288*

EVIDENCE.

See CONTRACT, 4; CRIMINAL LAW, 12 to 15; DEMURRER TO EVIDENCE; EXECUTION, 6; INTOXICATING LIQUOR, 1, 2; JUDGMENT, 6; NEGLIGENCE, 7, 19; NEW TRIAL, 3 to 5; PRACTICE, 3, 4, 6, 10; RECOGNIZANCE, 4.

1. *Transcript.—Certification by Justice of Peace.—Equivalent Terms.*—The certification of a transcript by a justice of the peace as "a correct statement of the proceedings had before me in the above entitled case" is the practical equivalent of a statement that the transcript is "a true and complete copy" of such proceedings, and authorizes its admission in evidence.
Yeager v. *Wright, 230*

2. *Physician and Patient.—Confidential Matters.—Knowledge Gained by Professional Examination.*—A physician can not testify to the result of observations or examinations made by him upon the person of a patient, unless the patient consents, or in some way waives his privilege. Section 497, R. S. 1881.
Williams v. *Johnson, 275*

3. *Conclusion.*—A question to a witness, which asks for the statement of an arrangement or agreement between parties, is not objectionable as calling for a conclusion.
Vogel v. *Harris, 494*

4. *Withdrawn Paragraph of Complaint.—Introduction by Defendant.*—A paragraph of complaint which has been withdrawn by a dismissal may be introduced in evidence by the defendant.
Baltimore, etc., R. W. Co. v. *Evarts*, 533

5. *Same.—Admissions.—Material Error.*—Where the paragraph withdrawn tends, by way of admissions, to prove that the plaintiff's theory, as ultimately relied upon for a recovery, is unsound, its exclusion from the jury is a material error. *Ib.*

6. *Weight of not Determined on Question of Admissibility.—Admissible if Tending to Support Theory.*—A court can not, on a question of the admissibility of evidence, determine its weight; but if there is any evidence tending to support the theory which makes the evidence competent, whether it be direct or indirect, the offered evidence must be admitted, when presented in proper form.
City of Terre Haute v. *Hudnut*, 542

7. *Competent and Incompetent Must be Separated.*—Where, by a single question or proposition, evidence partly competent and partly incompetent is offered, there is no error in excluding it. *Ib.*

8. *Expert Witness.—Qualifications of.*—No precise knowledge is required of an expert witness; it is enough if the witness shows such an acquaintance with the subject as to qualify him to give an opinion; and in an action to recover damages for injury to a mill, a witness, who is shown to be one of the owners of the mill, engaged in operating it, and to have knowledge of its structure and the injury, is *prima facie* competent to give an opinion as to the length of time required to repair it. *Ib.*

9. *Negligence.—Interruption of Business.—Profits as an Element of Damages.*—Where an established business of a permanent character, as a mill for the manufacture of grain into meal, hominy or the like, is suspended by an overflow, and machinery used therein so injured that in order to make repairs a cessation of business is necessary, the net earnings or profits of the present and past are competent to be considered by the jury in estimating the owner's damages during the period that his business is so interrupted. *Ib.*

EXAMINATION OF WITNESS.

See CRIMINAL LAW, 14, 15; WITNESS, 2, 3.

EXECUTION.

See PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. *Exemption.—Property Exempt Unaffected by Execution Lien.*—Property exempt from execution is unaffected by execution liens, and may be sold or exchanged while writs of execution are in the hands of the proper officer. *Barnard* v. *Brown*, 53

2. *Same.—Sale of Real Estate Exempt.—Rights of Grantee.—Judgment.—Action.—Demand.* Where one who has a right to the benefit of the exemption law owns property, real and personal, the aggregate value of which is less than $600, and sells the real estate, there being at the time judgments against him, which are liens on such real estate, he and his grantee may maintain a joint action to have the latter's title to such real estate quieted and freed from the apparent lien and encumbrance of such judgments, and the property of the former, owned at the time of such conveyance, set off to him as exempt from execution, and no demand is necessary to the maintenance of such action. *Ib.*

3. *Sheriff's Sale.—Upon Writ Improvidently Issued.—Sale not Void.*—A sale

of real estate under an alias writ is not void because the writ was improvidently issued, without an order from the judgment plaintiff. *Johnson* v. *Murray*, *154*

4. *Dormant Judgment.—Validity for Purpose of Execution.*—The validity of a judgment for the purpose of having execution upon it is not impaired because, by the expiration of ten years, it has ceased to be a lien on real estate. *Yeager* v. *Wright*, *230*

5. *Same.—Voidable Execution.—Revival of Judgment.*—An execution issued upon a dormant judgment, without a revival or leave of court, is not void, but only voidable as against direct proceedings to have it set aside. *Ib.*

6. *Same.—Transcript from Justice of Peace.—Filing and Recording.—Formal Proof of.—Recitals in Execution.*—Where an execution, issued by the clerk of the circuit court, upon a judgment rendered by a justice of the peace, is admitted in evidence without any objection that there has been no formal proof that the transcript of the judgment has been filed in the clerk's office and entered in the proper order-book and judgment docket, recitals contained in the execution that such steps had been taken will be held to supply the omission of such formal proof. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See APPEAL; DECEDENTS' ESTATES; INSURANCE, 5; WILL.

1. *Power of Administrator With Will Annexed.*—It is a general rule that an administrator with the will annexed takes all the power under the will which would have devolved upon an executor, had one been named. *Davis* v. *Hoover*, *423*

2. *Same.—Sale of Real Estate.—Implied Power.*—If a testator directs that his real estate be sold, without declaring by whom the sale shall be made, the power to sell, if no contrary intention appears, vests in the executor, if the proceeds are distributable by him, or if the duties imposed with reference thereto are such as usually devolve upon an executor. *Ib.*

3. *Same.—Order of Court.—When not Necessary.*—Under sections 2359 and 2360, R. S. 1881, it is not now, and has not been since the former section has been in force, necessary to obtain an order of court to authorize the sale of real estate specifically devised for the payment of debts or legacies. *Ib.*

4. *Same.—Appraisement.—Presumption.—Destroyed Records.*—Where the will directs that real estate shall be appraised before sale, it will be presumed, after a sale by the executor or administrator, in the absence of proof to the contrary, where the deed purports to have been made in accordance with the will, and where the public records have been destroyed, that an appraisement was had. Acts of 1883, p. 109. *Ib.*

EXEMPTION FROM EXECUTION.

See EXECUTION, 1, 2; FRAUDULENT CONVEYANCE, 2.

EXHIBIT.

See CHATTEL MORTGAGE, 1; PLEADING, 1.

EXPERT.

See EVIDENCE, 8; MUNICIPAL CORPORATION, 16.

FEES AND SALARIES.

See CORONER'S INQUEST; COUNTY CLERK.

FENCE.

See CONTRACT, 4; NEGLIGENCE, 17, 18; RAILROAD, 4, 5, 7 to 12.

FORECLOSURE.

See Chattel Mortgage, 9; Mortgage.

FOREIGN CORPORATIONS.

See Insurance, 6, 7.

FORFEITURE.

See Recognizance.

FORMER ADJUDICATION.

See Judgment, 5, 6, 16; Parent and Child, 3 to 5; Railroad, 15.

FORNICATION.

See Criminal Law, 6, 7.

FRANCHISE.

See Medicine and Surgery, 3.

FRAUD.

See Bankruptcy; Chattel Mortgage, 8; Fraudulent Conveyance; Insurance, 2, 5; Medicine and Surgery, 2; Payment; Promissory Note, 4, 7.

FRAUDULENT CONVEYANCE.

1. *Presumption.—Trust in Favor of Creditors.*—Where one purchases and pays the consideration for real estate, and takes the conveyance in the name of another, the transaction is presumptively fraudulent as to the prior creditors of the purchaser, and, under section 2975, R. S. 1881, a trust results in their favor. *Eiler* v. *Crull*, 518

2. *Same.—Subjection of Property by Creditors.—Exemption from Execution.—Other Property.* The creditors may subject such property to the payment of their claims, unless it is exempt from execution, or unless, at the time of the conveyance, or at the time suit is brought, the debtor has a sufficient amount of other property reachable by the ordinary processes of the court to pay the debt without resorting to the property so conveyed. *Ib.*

3. *Same.—Refusal to Apply Other Property.—Right of Creditor to Proceed Against Property Conveyed.*—If the debtor has other property, not subject to the ordinary processes of the court, which he refuses on demand to apply to the satisfaction of the debt, the creditor may proceed against the property fraudulently conveyed, and it will be no defence for the debtor to show that he had sufficient money or other property, not reachable by the ordinary processes, with which the debt could have been paid. *Ib.*

FREE GRAVEL ROAD.

See Gravel Road; Injunction, 1.

GRAND JURY.

See Criminal Law, 8, 9.

GRAVEL ROAD.

See Injunction, 1; Trespass.

1. *Free.—Petition.—Addition and Withdrawal of Names.—Board of Commissioners.—Estoppel.*—In a proceeding for the establishment of a free gravel road, the question as to whether the petition has been signed by the prescribed majority of land-owners remains an open one until the board of commissioners proceeds to consider and act upon the report of the viewers, which has been submitted, and until that time the names of persons may be added to the petition at their pleasure, and the names of persons who have signed it may be withdrawn

therefrom by leave of the board, which ought not to be refused on reasonable terms, except for good cause shown, in the nature of an estoppel. *Black* v. *Campbell*, 122

2. *Same.—Withdrawal of Names Must be Made Before Petition is Finally Passed Upon.*—In such a proceeding the withdrawal of names from the petition after it has been filed is a dismissal of the proceeding as to them, and such withdrawal must be made before a decision is announced upon the merits of the petition. *Ib.*

3. *Same.—Appeal to Circuit Court.—De Novo Proceeding.—Waiver.*—Upon an appeal to the circuit court from an order of the board of commissioners establishing a free gravel road, the appellants, whose motion before the board for leave to withdraw their names from the petition was overruled, may treat such motion as pending in the circuit court, or may, at their option, enter a similar motion *de novo* in that court, and the right to enter such motion on appeal is not waived by a prior motion made in the higher court to dismiss the proceedings on account of a lapse of jurisdiction over the subject-matter. *Ib.*

4. *Free.—Board of Commissioners.—Jurisdiction.—Petition.*—The presentation of a petition for the establishment of a free gravel road to the board of commissioners, which is in substantial conformity with the provisions of the statute, calls into exercise the jurisdiction of the board for the determination of the sufficiency of the petition in both form and substance, whether it was signed by the requisite number of land-holders, and every other fact precedent or concurrent necessary to the granting of the petition. *Ely* v. *Board, etc.*, 361

5. *Same.—Judgment.—Collateral Attack.*—The judgment of a board of commissioners establishing a free gravel road, after jurisdiction has been properly acquired, can not be collaterally assailed by a complaint which denies the jurisdiction of the board, on account of an alleged non compliance with the statute which requires the petition to be signed by a majority of the land-holders within certain territory. *Ib.*

GUARANTY.

1. *Notice.—Matter of Defence.*—If loss results to a guarantor on account of a failure to give notice of the non-performance of the contract guaranteed, the fact of loss and the failure to give notice constitute matters of defence. *Stanley* v. *Stanley*, 143

2. *Execution.—Delivery.—Estoppel.*—One who signs an instrument guaranteeing the performance of a contract by another, and leaves it in the custody of the latter, is estopped to deny that he authorised such person to deliver the instrument to the guarantee. *Snyder* v. *Click*, 293

3. *Notice of Acceptance.—When Not Necessary.*—Where the guaranty is direct and certain, and the thing guaranteed is definite in its amount and known to the guarantor, or ascertainable by the exercise of ordinary care at the time the guaranty is given, notice of acceptance is not necessary to bind the guarantor. *Ib.*

4. *Performance of Consideration.*—Where the guarantee accepts the guaranty, and, acting upon the faith of it, performs the consideration upon which it rests, the contract is complete and enforceable. *Ib.*

5. *Notice of Default.—Damages.—Matters of Defence.—Justice of Peace.—Burden of Proof.*—The failure to give the guarantor notice of default, and the resulting damages, are matters of defence; but if the action on the guaranty is brought before a justice of the peace, such matters may be given in evidence without plea, the burden being on the defendant to sustain them by a preponderance of the evidence. *Ib.*

GUARDIAN AND WARD.

See PARENT AND CHILD.

Death of Insolvent Guardian.—Settlement of Guardianship by Surety.—Jurisdiction.—Judgment.—Estoppel.—Where the surety of a deceased and insolvent guardian, at the request of the ward, who has become of age, makes a final report and settlement of the guardianship matter, which is subsequently approved by the court having probate jurisdiction, and the surety by the judgment of the court is discharged from liability on the bond, it will be presumed, in the absence of a showing to the contrary, that the court acquired jurisdiction over the person of the ward, and the judgment so rendered, while it remains in force, is a bar to an action on the bond. *Castetter* v. *State, ex rel.*, 446

HABEAS CORPUS.

See PARENT AND CHILD, 4 to 6.

HIGHWAY.

See NEGLIGENCE, 17, 18.

HOUSE OF ASSIGNATION.

See CRIMINAL LAW, 16.

HUSBAND AND WIFE.

See MORTGAGE, 1 to 3; MUNICIPAL CORPORATION, 5 to 9; WITNESS, 1.

INDICTMENT.

See CRIMINAL LAW.

INFANCY.

See CRIMINAL LAW, 16; JUDGMENT, 11.

Voidable Proceedings.—Personal Privilege.—Persons in Privity of Estate.—In respect to voidable contracts and proceedings, infancy is a personal privilege, not available to persons in privity of estate.

Harris v. *Ross*, 314

INJUNCTION.

See DRAINAGE, 2, 3.

1. *Free Gravel Road.—Insufficient Petition.—Void Proceedings.—Collection of Tax.*—A complaint to restrain the collection of a tax, levied for the construction of a free gravel road, which alleges that, on appeal by certain land-owners from the order of the board of commissioners levying the tax, the circuit court adjudged that the petition for the tax was not signed by a majority of the land-owners within two miles of the proposed road, and that the proceedings of the board thereon were void, is good. *Fleener* v. *Claman*, 288
2. *Same.—Estoppel.—Facts Constituting Must be Pleaded.*—If facts constituting an estoppel exist they must be pleaded. *Ib.*
3. *Drainage Assessment.—Notice.—Complaint.*—An averment in a complaint to enjoin the sale of land under a ditch assessment that there was "no proper or legal notice" of the proceedings to establish the drain is a mere conclusion, and insufficient. *Harris* v. *Ross*, 314
4. *County Commissioners.—Erection of Bridge.—Complaint.—Interest of Party.*—A complaint to enjoin the county commissioners from contracting for the erection of a bridge is bad, if it is not shown that the plaintiff has an interest in the cause of action or that he will be affected by the proposed contract. *Farris* v. *Jones*, 498

INQUEST.

See CORONER'S INQUEST.

INSTRUCTIONS TO JURY.

See SUPREME COURT, 6.

1. *Making Part of Record.*—It is doubtful whether instructions to the jury are such papers as may, under section 650, R. S. 1881, be made a part of the record by an order of the court, or whether they can be brought into the record in any other manner than by bill of exceptions, or in the mode prescribed by section 535
Cincinnati, etc., R. W. Co. v. Lutes, 276

2. *Special Finding of Facts.—Request for.—Discretion of Court.—Practice.* The question as to the time when a party shall make a request of the court to instruct the jury to find specially upon particular questions of fact, if they render a general verdict, is left by the code to the sound discretion of the trial court, and in the absence of an abuse of such discretion the action of that court will not be interfered with on appeal. *Kopelke v. Kopelke, 435*

INSURANCE.

See MORTGAGE, 5 to 7.

1. *Joint Action on Policy.—Mortgagee.—Judgment.—Parties.*—Where a policy of insurance, issued to the owner of a building, provides that the loss, if any, shall be paid to a mortgagee "as his interest may appear," such mortgagee and owner may, in case of loss, where the amount of insurance exceeds the sum secured by mortgage, maintain a joint action against the insurance company, and are entitled to have the judgment fix the amounts due to each respectively.
Home Insurance Co. v. Gilman, 7

2. *Policy.—Principal and Agent.—Payment of Premium.—Estoppel.—Fraud and Mistake.*—Where a duly authorized agent of an insurance company delivers a policy of insurance, which acknowledges on its face that the premium has been paid, such acknowledgment concludes the company from thereafter denying the payment of the premium for the mere purpose of assailing the legal existence of the policy, unless the same was procured by fraud or through a mistake. *Ib.*

3. *Waiver of Payment of Premium.*—The agent of an insurance company, authorized to deliver policies and receive payment, may waive the payment of the premium in cash, notwithstanding a stipulation in the policy to the contrary, and in the absence of bad faith and collusion, a policy so delivered is enforceable. *Ib.*

4. *Contract.—Authority of Agent.—Premium.—Payment of.*—The agent of an insurance company, authorized to deliver policies and receive payment, issued and delivered a policy of insurance, there being an agreement between him and the assured that the amount of the premium fixed should be credited upon his individual indebtedness to the latter, which was done. The agent made report of the policy, and transmitted the amount of the premium to the company in due course, which the latter received and retained until suit was brought, when it tendered the same to the assured. In an action upon the policy,
Held, that in the absence of fraud the company is liable. *Ib.*

5. *Pleading.—Complaint.—Ownership of Property Insured.*—In an action against an insurance company upon a policy of insurance, where the complaint alleges the plaintiff to be the owner in fee simple of the property destroyed, and the evidence shows that he held an executor's deed thereto, under which he had in good faith taken possession, the insurance company can not by way of defence attack such conveyance by questioning the power of the executor in that regard. *Ib.*

6. *Foreign Insurance Companies.—Right to do Business in this State.—Legislative Regulation.*—A State Legislature has authority to prescribe the

terms upon which foreign insurance companies may transact business within the State. *Phenix Ins. Co.* v. *Burdett, 204*

7. *Same.—Duty of Agents to Retain Money.—Constitutionality of Statute.*—Section 4 of the act of December 21st, 1865 (section 3768, R. S. 1881), requiring the agents of foreign insurance companies, when losses occur, to retain moneys of such corporations coming into their possession until the losses are adjusted, or to abide the event of a suit, is constitutional. *Ib.*

INTEREST.

See PROMISSORY NOTE, 8, 9, 10.

INTOXICATING LIQUOR.

1. *Affidavit for Continuance.—Admissibility in Evidence.—Admissions.*—An affidavit for a continuance containing admissions by the accused is admissible in evidence against him, but he may explain the statements therein by any competent evidence. *Behler* v. *State, 140*

2. *Sale to Minor.—Good Faith of Seller.—Fabrication of Evidence.*—In a prosecution for selling intoxicating liquor to a minor, it is proper to prove facts tending to show that the defendant did not act in good faith, believing the buyer to be twenty-one years of age, and on this point the fabrication of evidence may be shown. *Ib.*

3. *Prosecuting Attorney.—Misconduct in Argument.*—Where the prosecuting attorney confines his argument to the issues and the evidence there is no misconduct, although there may be erroneous inferences. *Ib.*

JUDGMENT.

See CHATTEL MORTGAGE, 9; EXECUTION; GRAVEL ROAD, 5; GUARDIAN AND WARD, INFANCY; INJUNCTION, 1, 3; INSURANCE, 1; PARENT AND CHILD, 3 to 5; STATUTE OF LIMITATIONS, 1; TRESPASS.

1. *Nunc pro Tunc Entry.—Memorandum of Record.*—A paper containing a calculation made by the judge who tried the case, and which was by him certified to have been filed and treated as a paper in the case, is such a memorandum of record as authorized a *nunc pro tunc* entry correcting the amount of the judgment. *Johnson* v. *Moore, 91*

2. *Review of.—Jurisdiction of Person.—Appearance.—Complaint.*—A complaint to review a judgment, on the ground that the court acquired no jurisdiction over the person of the defendant, is bad if the record shows an appearance by or for the defendant. *Harman* v. *Moore, 221*

3. *Same.—Proceeding by Party to Set Aside.—Collateral Attack.—Matters Dehors the Record.*—Where the record of a court of general jurisdiction, either affirmatively or by the presumptions which attach to it, shows that a judgment has been rendered against a party over whom the court had acquired jurisdiction, any attack, the sole purpose of which is to have the judgment declared void, by showing matters *dehors* the record, is a collateral attack and can not be made by a party to the judgment. *Ib.*

4. *Same.—Jurisdiction.—Unauthorised Appearance.*—Where the record shows that the court acquired jurisdiction over the person of the defendant by an appearance and answer, the mere fact the latter signed the paper purporting to be an answer out of court and left it in the possession of the plaintiff's attorney, who filed it in his absence, wherefore it is alleged that the judgment is void for want of jurisdiction, does not entitle him to have the judgment set aside. *Ib.*

5. *Former Adjudication.—Chattel Mortgage.—Satisfaction of Judgment.—Pleading.—Departure.*—A complaint to obtain the satisfaction of a judgment alleged that the judgment creditor had accepted personal property for the amount of the judgment but refused to cancel it. An answer alleged that, in a former action between the same par-

ties, it was adjudged that such personal property was, at the time it was taken, the property of the judgment creditor by virtue of a chattel mortgage executed by the judgment debtor. The reply admitted the judgment, but alleged that it was rendered upon the agreement that, in consideration of the judgment and the surrender of the mortgaged property, the judgment should be satisfied and cancelled. *Held*, that the reply is not a departure from the complaint and is sufficient. *Palmer* v. *Hayes*, 289

6. *Same.—Nominal Party.—Judgment Conclusive Upon Real Party.—Evidence.*—One who, being the real party in interest, prosecutes an action in the name of another, is concluded by the judgment rendered therein, and in a subsequent action by him for the same cause it is error to exclude evidence showing his relation to the former proceeding. *Ib.*

7. *Township.—Misnomer.*—A judgment against "Brown *Civil* Township" is not void on account of the inaccuracy in the name of the political corporation. *Vogel* v. *Brown Township*, 299

8. *Same.—Failure to Plead Misnomer.—Estoppel.*—Where a writ is served on a party, individual or corporate, by a wrong name, if there is a failure to appear and plead the misnomer, such party is concluded, and in all future proceedings may be connected with the judgment by proper averments. *Ib.*

9. *Default.—Failure to Call Defendant.*—A failure to call a party before entering a default is a mere irregularity, and not a material error. *Ib.*

10. *Summons Against Township Trustee.—Void Judgment Against Township.*—A summons against "Valentine Strange, trustee of Brown Civil Township," is not a writ against the township, but against its agent merely, and will not support a judgment against the township. *Ib.*

11. *Irregularity. — Remedy. — Infancy.* — All persons, including infants, against whom a merely irregular judgment has been taken, must seek relief therefrom by direct proceedings or by an appeal. *Harris* v. *Ross*, 314

12. *Summons Against Agent.—Judgment Void Against Principal.—Township.—Trustee.*—Where the summons is issued against the trustee of a township, a judgment thereon against the township is void, it being necessary that the writ should go against the corporation. *Vogel* v. *Brown School Township*, 317

13. *Irregularities.—Collateral Attack.*—Mere irregularities are not available in a collateral attack upon a judgment. *Kleyla* v. *Haskett*, 515

14. *Drainage Proceeding. - Notice. - Sufficiency.*— Where there was some notice in a drainage proceeding, although defective, a collateral attack upon the judgment can not be maintained. *Ib.*

15. *Same.—Pleading.—Conclusions.*—An allegation in a complaint to set aside a judgment that "no notice was given as required by law" is a conclusion, as the sufficiency of the notice is a question for the court. *Ib.*

16. *Former Adjudication.—Estoppel.*—A judgment in a former action between the same parties is conclusive, and bars a subsequent action, if the same facts were presented for adjudication and an opportunity afforded to litigate the entire subject-matter. *Jarboe* v. *Severin*, 572

JURISDICTION.

See GRAVEL ROAD, 3 to 5; GUARDIAN AND WARD; INJUNCTION, 1; JUDGMENT, 2, 10, 12.

JURY.

See CRIMINAL LAW, 8, 9; INSTRUCTIONS TO JURY; NEGLIGENCE, 16; TRIAL.

1. *Struck Jury.—Peremptory Challenge.*—The parties to an action do not have the right of peremptory challenge in the case of a struck jury, demanded under section 525, R. S. 1881. *May* v. *Hoover, 466*

2. *Same.—Estoppel.—Practice.*—One who has peremptorily challenged struck jurors after his adversary has been permitted, over objection, to do so, is not thereby estopped to complain of such ruling. *Ib.*

JUSTICE OF THE PEACE.

See APPEAL BOND; CORONER'S INQUEST; EVIDENCE, 1; EXECUTION, 6; GUARANTY, 5.

LABORERS AND EMPLOYEES.

1. *Mines.—Lien of Employees.*—The lien of miners and other persons employed in and about coal mines, for work and labor, is paramount to prior mortgages. *Warren* v. *Sohn, 213*

2. *Preference as Creditors.— Lien.—Suspension of Employer's Business by Act of Creditor.—Statute Construed.*—Under the provisions of section 5206, R. S. 1881, the laborers or employees of any company, corporation, firm or person engaged in manufacturing or mechanical business, or in the construction of any work or building, are preferred creditors of such employer or employers to an amount not exceeding fifty dollars to each of such employees, for work done within the six months preceding, whenever the business of the employer has been suspended by any action of creditors, whether with or without the consent of the failing or insolvent debtor. *Bass* v. *Doerman, 390*

3. *Same.*—Where a firm, engaged in manufacturing, being insolvent, and for the purpose of preferring a creditor, voluntarily conveys all its property to him, whereby the business of such firm is suspended, the laborers and employees thereof are preferred creditors to an amount not exceeding fifty dollars each, for work done within the six months preceding such conveyance, and the creditor sought to be preferred by the conveyance takes the property subject to the lien of such laborers and employees. *Ib.*

LEASE.

See CONTRACT, 2.

LEGAL DISABILITY.

See MARRIED WOMAN, 2; MUNICIPAL CORPORATION, 9.

LICENSE.

See MEDICINE AND SURGERY; MUNICIPAL CORPORATION, 19; RAILROAD, 28.

LIEN.

See CHATTEL MORTGAGE; EXECUTION; LABORERS AND EMPLOYEES; MINES; MORTGAGE; MUNICIPAL CORPORATION, 3; VENDEE'S LIEN.

MARRIED WOMAN.

See MORTGAGE, 1 to 3; MUNICIPAL CORPORATION, 5 to 9.

1. *Estoppel in Pais.*—Prior to September 19th, 1881, when the statutes of that year went into force, a married woman's rights in real estate could not be affected by an estoppel *in pais*. *City of Indianapolis* v. *Patterson, 344*

2. *Disabilities.—Statute of Limitations.*—Since the taking effect of the statutes of 1881 a married woman has been under no legal disability excepting her from the operation of the six years statute of limitations. *Ib.*

MASTER AND SERVANT.

See LABORERS AND EMPLOYEES; NEGLIGENCE, 4; RAILROAD, 16 to 21.

MEASURE OF DAMAGES.

See DAMAGES.

MEDICINE AND SURGERY.

1. *Act Regulating.—Constitutionality.—License.—Qualifications of Applicants.—Special Privileges and Immunities.*—The act of April 11th, 1885 (Acts of 1885, p. 197), regulating the practice of medicine, surgery and obstetrics, requiring a license and prescribing the qualifications of persons entitled to receive the same, viz., (1) graduation from a reputable medical college, (2) a continuous residence and practice of medicine in this State for ten years prior to the taking effect of the act, or (3) a continuous residence and practice of medicine in this State for three years prior to the taking effect of said act and an attendance upon one full course of lectures at a reputable medical college, is not unconstitutional as granting special privileges and immunities to the citizens of this State, or otherwise.
State, ex rel., v. Green, 462

2. *Same.—License Procured by Fraud.—Proceeding by Prosecuting Attorney to Annul.—Quo Warranto.*—While the act of April 11th, *supra*, declares that a license procured by fraud shall be void, no provision is made for any judicial proceeding to have it so adjudged, nor can the prosecuting attorney bring an information in the nature of a *quo warranto* against the licensee to annul a license so obtained. *Ib.*

3. *Same.—License not a Franchise.*—The right of a person to practice his profession, under a license issued pursuant to a statute enacted by the Legislature under the police power of the State, is not a franchise, it being essential to the character of a franchise that it should be a grant from the sovereign authority of the State. *Ib.*

4. *Same.*—Section 1145, R. S. 1881, providing that an information may be prosecuted for the purpose of annulling any letters-patent, certificate or deed issued by the State authorities, when obtained by fraud, relates to real estate transactions, and is not applicable to licenses issued under the medicine and surgery act. *Ib.*

MINES.

See LABORERS AND EMPLOYEES, 1.

1. *Priority of Liens for Labor and Royalty.—Constitutionality of Statute Giving.*—Section 5471, R. S. 1881, giving miners and other persons employed in and about coal mines a prior lien on the mining property for work and labor, and land-owners a prior lien for royalty, is not in conflict with any provision of the Constitution of this State or of the United States. *Warren v. Sohn,* 213

2. *Same.—Mortgage of Mining Property.—Rights of Mortgagee.—Notice.*—The provisions of section 5471, *supra*, enter into and become a part of mortgages executed upon coal mining property, and the mortgagees acquire liens subject to such statutory liens as may thereafter attach for work and labor performed and for royalty, and with notice that the latter liens will be prior and paramount. *Ib.*

MISNOMER.

See JUDGMENT, 7, 8.

MISTAKE.

See INSURANCE, 2; MUNICIPAL CORPORATION, 5.

MORTGAGE.

See CHATTEL MORTGAGE; INSURANCE, 1; LABORERS AND EMPLOYEES; MINES; PAYMENT; STATUTE OF LIMITATIONS, 3, 4.

1. *Husband and Wife.—Tenants by Entireties.—When Mortgage Void.*—A

mortgage executed by a husband and wife upon land owned by entireties is void, under section 5119, R. S. 1881, if the wife executed it as surety for her husband, but valid if the money obtained is for the benefit of the joint estate. *Bartholomew* v. *Pierson, 430*

2. *Same.—Foreclosure.—Cancellation.—Wife's Suretyship.—Cross-Complaint.—Burden of Proof.*—If, in a suit to foreclose such a mortgage, the wife by cross-complaint alleges her suretyship and asks a cancellation of the mortgage, the burden is upon her to show its invalidity for the cause mentioned. *Ib.*

3. *Same.—Special Finding as to Suretyship.*—Where there is a finding merely that the wife signed the mortgage to enable her husband to obtain the money advanced thereon, and not to obtain the money for herself, and that the husband received the money, a conclusion of law that the mortgage is void and should be cancelled is not warranted, in the absence of a finding of the ultimate fact that the wife signed as surety. *Ib.*

4. *Series of Notes.—Default in Payment.—Stipulation that Whole Debt Becomes Due.—Waiver.* Where a mortgage given to secure notes maturing at different times provides that upon the failure of the mortgagor to pay the first note at maturity the others shall become due, no election on the part of the creditor being stipulated for, the latter, by merely accepting the amount of the first note after default, does not thereby waive his right to treat the whole debt as due. *Moore* v. *Sargent, 484*

5. *Interest of Mortgagee in Insurance Effected by Mortgagor on Mortgaged Premises.*—A mortgagee, merely as such, has no interest, legal or equitable, in a policy of insurance effected by the mortgagor upon the mortgaged premises for his own benefit, in the absence of any covenant or contract requiring the latter to insure for the benefit of the former. *Nordyke & Marmon Co.* v. *Gery, 535*

6. *Same.—Covenant.—Equitable Lien of Mortgagee.*—Where a mortgagor has covenanted that he will keep the mortgaged premises insured for the benefit of the mortgagee, and either has effected or thereafter effects insurance in his own name, though without the mortgagee's knowledge, and without intent to perform the agreement, such insurance will be treated as having been effected under the agreement, and the mortgagee will have an equitable lien thereon. *Ib.*

7. *Same.—Performance by Mortgagor of Covenant to Insure.*—Where a mortgagor, who has covenanted to insure the mortgaged premises for the benefit of the mortgagee, has effected solvent insurance, in good faith, in the name and to the acceptance of the latter, to an amount adequate to secure the debt, and has kept the policies alive until loss occurs, he is not in default, and will be responsible thereafter only for such infirmities as existed in the insurance at the time the policies were accepted, or such as may have resulted from his own subsequent conduct. *Ib.*

8. *Fractions of a Day.*—The law will regard fractions of a day when important in the settlement of conflicting interests. *Gibson* v. *Keyes, 568*

9. *Same.—Mortgages Executed on Same Day.—Priority.*—Where separate mortgages are executed to different parties on the same day, the one first executed and delivered will have priority. *Cain* v. *Hanna*, 63 Ind. 408, and *Moffitt* v. *Roche*, 76 Ind. 75, distinguished. *Ib.*

MUNICIPAL CORPORATION.

See NEGLIGENCE, 1, 2; RAILROAD, 10, 20; TAXES.

1. *City.—Ordinance.—Reasonableness of.—Legislative Authority.*—An ordinance can not be held to be unreasonable which is expressly authorized by the Legislature. *Coal-Float* v. *City of Jeffersonville, 15*

2. *Same.*—The power of a court to declare a city ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and where the same was passed under the supposed incidental power of the corporation merely. *Ib.*

3. *Same.—Lien on Water-Craft.—Wharfage.—Statute.*—Where the common council of a city passes an ordinance fixing the rate of wharfage to be paid by boats, etc., it is not necessary to the enforcement of a lien against a boat for delinquent wharfage that the ordinance should provide for such enforcement. When such delinquency occurs, the city may proceed under the provisions of section 5277, R. S. 1881, which fixes the lien, and have a judgment *in rem* against the boat for the amount due. *Ib.*

4. *City.—Annexation of Platted Land.—Plat by One Having no Authority.*—A city has no jurisdiction to annex, by a resolution of its common council, lots laid off and platted by one who is not the owner of the land and who has no authority in the premises.
City of Indianapolis v. *Patterson*, 344

5. *Same.—Husband and Wife.—Mistake.*—A husband can not, without authority from his wife, plat her land, and the fact that the land which he assumes to plat was omitted by mistake from a previous plat made and acknowledged by her can make no difference. *Ib.*

6. *Same.—Estoppel.—Taxes.—Conveyance.—Street Improvement.*—A wife, whose land has been platted without her knowledge or consent by her husband, is not estopped to dispute the validity of the plat, and the subsequent annexation of the land to a city, by paying city taxes and executing conveyances, without knowledge of the facts, and in the belief that such transactions relate to lots previously and legally platted by her, nor by a street improvement of which she had no knowledge and which was made at the expense of lot-owners. *Ib.*

7. *Same.—Married Woman.—Estoppel in Pais.*—Prior to September 19th, 1881, when the statutes of that year went into force, a married woman's rights in real estate could not be affected by an estoppel *in pais*. *Ib.*

8. *Same.—Illegal Annexation.—Recovery of Taxes.—Statute of Limitations.*—Where the plat and the annexation are void, taxes assessed and collected by the city are illegal, and may, there being no estoppel, be recovered back, unless barred by the six years statute of limitations, which begins to run with each payment. *Ib.*

9. *Same.—Removal of Married Women's Disabilities.—Statutes of 1881.*—Since the taking effect of the statutes of 1881 a married woman has been under no legal disability excepting her from the operation of the six years statute of limitations, and where the full period of the statute had run against causes of action in her favor prior to September 19th, 1881, she had two years thereafter within which to sue, and no longer. *Ib.*

10. *Negligence.—Town.—Improvement of Sidewalk by Lot-Owner.—Excavation.*—To a complaint against a town to recover for an injury sustained by falling, in the night-time, into an excavation in a sidewalk, an answer that the excavation was made by the owner of the abutting lot in pursuance of an ordinance requiring him to improve the sidewalk, and that he had, when the work was left on the night in question, placed proper danger signals at the excavation, which the plaintiff, without any fault on the part of the lot-owner, had disregarded, is good.
Dooley v. *Town of Sullivan*, 451

11. *Same.—Danger Signals.—Keeping Watch.*—Only ordinary care is required of a municipal corporation, its agents and contractors, and it is sufficient to show that proper signals or guards were placed about an exca-

vation on quitting work, unless there are circumstances peculiar to the particular case making it necessary that a watch be kept, and if such signals or guards are removed during the night by a wrong-doer there is no liability. *Ib.*

12. *Same.—Liability of Town for Acts of Property-Owner.*—The acts of a property-owner, who improves a sidewalk under an ordinance adopted in pursuance of section 3367, R. S. 1881, are not the acts of the town in such a sense as to charge the latter for his negligence; but, in order to charge the corporation, evidence of his negligence must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous. *Ib.*

13. *Sewer.—Negligence.*—A municipal corporation is liable for negligence in devising the plan of a sewer constructed by it, as well as for negligence in the manner of doing the work.
City of Terre Haute v. *Hudnut, 548*

14. *Same.—Skill Required in Plan for Sewer.*—Where the authorities of a municipal corporation undertake the work of constructing a sewer, or system of sewers, it is their duty to use reasonable care to procure the services of men skilled in such matters to prepare the plans for the same, and if there is a lack of such care, by reason of which the plans are defective, they are guilty of negligence, for which the corporation must answer in case of damage resulting from such defective plans. *Ib.*

15. *Same.—When not Liable for Defective Sewer.*—Where, however, reasonable care is exercised by the municipal authorities in securing the employment of fair care and skill in the preparation of plans for a sewer, and ordinary care is used to see that such skill is brought into exercise, then there is no negligence, and can be no liability, although when the plan is carried into effect a defect may be developed which destroys or impairs its efficiency. *Ib.*

16. *Same.—Evidence.—Reasonable Care.—Consultations With Experts.*—Where a recovery is sought for injuries caused by a defective sewer, or by a sewer of inadequate size, the defect or insufficiency being caused by a defect in the plan, it is competent for the municipal corporation to show that reasonable care was exercised in the employment of a competent engineer or expert to prepare the plan, and that ordinary care was used in seeing to it that he exercised skill, and, to this end, evidence of consultation with experts, so employed, or of examination of plans by councilmen, is competent, though not in writing. *Ib.*

17. *City.— Obstruction in Street.— Liability of City.— Negligence.—Notice.*—Where an obstruction is placed on a street or sidewalk by a wrong-doer, on account of which a passer-by is injured, the city can not be held liable for such injury unless it has actual notice of the obstruction, or the same has remained on such street or sidewalk such a length of time as to make it the duty of the corporate authorities to take notice of its existence. *City of Warsaw* v. *Dunlap, 576*

18. *Same.*—Where an obstruction, of which the city has no notice, has been placed on a street by a third person, and is permitted to remain an hour and three-quarters, when it occasions an injury to a passer-by, the city is not guilty of negligence, and is not liable. *Ib.*

19. *Same.—Liability for Acts of Licensees.—Notice.*—A city is not liable for the acts of persons it licenses to use its streets, unless the thing authorised is intrinsically dangerous, or the municipal authorities have notice of the negligence of its licensees. *Ib.*

NATIONAL BANKS.

See BANKS AND BANKING.

NEGLIGENCE.

See DAMAGES, 8; EVIDENCE, 9; MUNICIPAL CORPORATION, 10 to 19; RAILROAD.

1. *Municipal Corporation.—Town.—Streets and Sidewalks.—Defects and Obstructions in.—Liability for.*—A municipal corporation is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for travel by night as well as by day; but, that a pavement has become uneven, or that bricks therein may be displaced by the action of the elements, does not necessarily involve such municipality in liability if the defect can be readily discovered and easily avoided by persons exercising due care, or if the defect be of such a nature as not of itself to be dangerous to persons so using the walk. *Town of Gosport* v. *Evans, 133*

2. *Same.—Contributory Negligence.*—One who sees an obstruction in a street or sidewalk, and, knowing its dangerous character, deliberately goes into or upon it when he is under no compulsion to do so, or might avoid it by going around, takes the risk upon himself, and if injured on account of such obstruction can not, because of contributory negligence, maintain an action therefor. *Ib.*

3. *Sufficiency of Complaint Charging.*—A general allegation of negligence in the performance of, or in failing to perform, a duty which the law casts upon a defendant, resulting in injury to the plaintiff, without his fault, is sufficient to withstand a demurrer. *George H. Hammond & Co.* v. *Schweitzer, 246*

4. *Master and Servant.—Dangerous Machinery.*—Where an employer negligently permits an elevator, which an employee in the performance of his duty is required to go upon, to become dangerous and to remain unfit for use, and the latter, having no knowledge of its dangerous condition, and being without fault, is injured while in the course of his employment by reason of its unsafe condition, the employer is liable. *Ib.*

5. *Wilful Injury.—Complaint.*—A complaint to recover damages for an injury should proceed upon a definite theory, either for a wilful injury or for one caused by negligence, and it will be judged from its general scope and tenor. *Gregory* v. *Cleveland, etc., R. R. Co., 395*

6. *Same.—Sufficiency of Complaint for Wilful Injury.*—A complaint to recover damages for a wilful injury must show that the injurious act was purposely or intentionally committed, with the intent wilfully and purposely to inflict the injury complained of. *Ib.*

7. *Same.—Intent.—Evidence.*—The unlawful intent may be shown by direct evidence, or it may be inferred from conduct which shows a reckless disregard of consequences and a willingness to inflict injury, by purposely and voluntarily doing an act with knowledge that some one is unconsciously or unavoidably in a situation to be injured thereby. *Ib.*

8. *Same.—Verdict.—When Court May Direct.*—If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, the court may direct a verdict for the defendant without submitting the evidence to the jury. *Ib.*

9. *Purely Accidental Occurrences.*—Where an event takes place the real cause of which can not be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences designated as purely accidental, and, there being no presumption of negligence in such cases, the party who asserts negligence must show enough to exclude the case from the class mentioned. *Wabash, etc., R. W. Co.* v. *Locke, 404*

10. *Railroad Company.—Duty to Persons Lawfully Upon Its Grounds.*—A railroad company owes to one, not a servant of the company, who is lawfully engaged in loading a car upon its side-track, the duty to have its premises in a reasonably safe condition, and to prevent damage to him, and others having occasion to transact business with it, from any unseen or unusual danger of which it has knowledge, or by the exercise of reasonable vigilance and sagacity should have knowledge. *Ib.*

11. *Accidents Prima Facie Unavoidable.—Burden of Proof.*—The obligation of the railroad company does not require it to make its depot and grounds absolutely safe, and where the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence must show that the defendant has violated a duty incumbent upon it, from which the injury followed in natural sequence. *Ib.*

12. *Anticipation of Accident.*—The proper inquiry in such cases is not whether the accident might have been avoided if the company had anticipated its occurrence, but it is whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence by the use of such reasonable precautions as would have been adopted by prudent persons. *Ib.*

13. *Structures and Appliances.—Failure to Anticipate Accident.*—When a structure or appliance, such as is in general use, and which is not inherently dangerous, has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it can not be said that a person has not acted with ordinary prudence if he fails to anticipate an accident which afterwards happens in its use when substantially in its usual condition. *Ib.*

14. *Telegraph Wires Over Railroad Track.*—Where telegraph wires at a railroad station are stretched over the track, trains daily passing under them, the railroad company is only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business. *Ib.*

15. *Displacement of Wire by Contact with Brakeman.—Injury to Third Person.*—A brakeman over six feet high was standing erect upon a moving freight car some inches higher than the average. In passing under telegraph wires stretched over the track, at the station, his head came in contact with a wire, which, from an unexplained cause, had become slackened, thus breaking the insulator and causing the wire to fall. It coiled around a man at work upon a flat-car twenty-five feet from the main track, and, catching upon a brake-handle of the moving train, dragged him from the flat-car and inflicted injuries resulting in his instant death. The tall brakeman and others had daily passed under the wires without thought of contact therewith, and apprehended no danger from that cause.

Held, that the accident was one which the railroad company was not bound to anticipate, and it is not liable. *Ib.*

16. *Jury.—Province of.—Inference of Negligence.*—A jury can not arbitrarily infer negligence, but the evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken. *Ib.*

17. *Barbed Wire Fence Along Highway.—Liability of Land-Owner.*—The act of a land-owner in erecting upon his property, and along the line of a public highway, a barbed wire fence, does not in itself render him liable to one who sustains an injury therefrom, but there may be a liability if the fence is constructed and maintained in such a manner as to constitute negligence and a breach of duty owed to others or to the community. *Sisk* v. *Crump*, 504

18. *Same.—Injury to Animal Wandering Upon Highway.—When Owner May Recover Damages.*—Where an order has been made by the proper authorities permitting horses and cattle to run at large, a land-owner, who negligently constructs and knowingly maintains in such a manner as to be dangerous, and in effect a trap, a barbed wire fence between his pasture-field and the adjacent highway, is liable for the value of a horse which, while feeding along the highway, is attracted by other horses within the field and by the growing grass therein, and in attempting to enter the enclosure becomes entangled in the wires and is killed. *Ib.*

19. *Evidence.—Presumption.*—Negligence is never presumed, and a plaintiff who alleges it as a cause of action must establish the breach of duty which constitutes the negligence or a recovery will be denied. *City of Warsaw* v. *Dunlap*, 576

20. *Railroad.—Attempt to Pass Between Cars.—Personal Injury.—Contributory Negligence.*—One who attempts to pass between the coupled cars of a freight train standing temporarily across a street, at a way station, and either knows or might know by using his natural faculties that the train is likely to move at any moment, is guilty of such contributory negligence as bars a recovery for an injury sustained by the starting of the train. *Lake Shore, etc., R. W. Co.* v. *Pinchin*, 592

21. *Same.—Direction of Brakeman.—Obvious Danger.*—The direction of a brakeman to a person to pass between the cars of a train standing on a highway will not justify him in attempting to do so, where the danger is obvious. *Ib.*

NEW TRIAL.

See PRACTICE, 9.

1. *As of Right.—Bond.—Defects.—Curative Statute.*—Defects in a bond executed by a party under section 1064, R. S. 1881, upon applying for a new trial as of right, are cured by section 1221, and the principal and sureties in such bond are bound as fully as if it were in all respects according to the statute requiring it. *Stanley* v. *Dailey*, 489

2. *Same.—Setting Aside Order Granting.—Waiver of Objections to Bond.*—The omission of the words "and damages" from such a bond does not authorize the setting aside of the order granting the new trial, on a motion made a year later, and in the absence of any previous objection to the sufficiency of the bond as executed and approved. In such case the objection to the bond, being technical and not having been made at the proper time, will be deemed waived. *Ib.*

3. *Newly Discovered Evidence.—Diligence.*—A new trial will not be granted on the ground of newly discovered evidence where, by the use of reasonable diligence, such evidence might have been obtained and used at the trial. *Allen* v. *Bond*, 515

4. *Same.—Facts Constituting Diligence Must be Set Out.*—Mere allegations of due diligence in endeavoring to obtain evidence in the first instance is not enough, but the facts constituting the diligence used must be stated so the court may determine whether it was sufficient. *Ib.*

5. *Same.—Absent Witness.—Efforts to Procure Testimony of.*—Where a party is denying the validity of a marriage alleged to have been performed

by a named minister, in a certain city, at a specified time, and knows before the trial that the testimony of such minister is important, he can not, after the term, obtain a new trial on the ground of newly discovered evidence, unless he excludes negligence on his part in ascertaining the whereabouts of the minister, shows that he moved promptly to obtain his testimony, and that he could not, by the exercise of reasonable diligence, procure the same at the trial. *Ib.*

NOTARY PUBLIC.

See CHATTEL MORTGAGE, 4 to 6.

NOTICE.

See DECEDENTS' ESTATES, 1; GUARANTY, 1, 3, 5; INJUNCTION, 3; JUDGMENT, 14; MINES, 2; MUNICIPAL CORPORATION, 17 to 19; PROMISSORY NOTE, 7; SUMMONS.

NUISANCE.

See CRIMINAL LAW, 1, 2.

OFFICIAL SEAL.

See CHATTEL MORTGAGE, 4, 5.

OFFICE AND OFFICER.

See COUNTY CLERK; CRIMINAL LAW, 4; TRESPASS.

1. *County Surveyor.—Term of Office.*—One elected to the office of county surveyor at the general election in November, 1884, who, in accordance with the provisions of his commission, took possession of such office on the 15th of the same month, and performed the duties thereof for the period of two years, can not continue to hold the same after his successor has been elected and qualified and makes demand therefor. *Boyles* v. *State, ex rel., 147*

2. *Title to Office.—Quo Warranto.—Civil Remedy.—Pleading.*—An information in the nature of a *quo warranto*, when brought on the relation of an individual to establish his right to an office, is regarded in the light of a civil remedy, for the determination of a civil right, and its sufficiency is to be determined by the rules applicable to pleadings in civil actions. *Jones* v. *State, ex rel., 193*; *Barrett* v. *State, ex rel., 322*

3. *Same.—Sufficiency of Information.*—The information must contain such a plain statement of the facts which constitute the grounds of the relator's claim as to make it affirmatively appear that he has title to the office in controversy. *Ib.*

4. *County Commissioner.—Term of.—Applies to Office, Not to Person.*—The term of county commissioner applies to the office, and not to the person, and it ends with the expiration of each period of three years, regardless of the time when the officer commenced service in the term to which he was elected. *Ib.*

5. *Same.—Confusion in Terms.—Act of 1885.*—J. was elected county commissioner in 1882. By reason of the encroachments of predecessors the term to which he was elected expired in November, 1883. S. was elected to the same term in 1884.

Held, that under the act of March 7th, 1885, S., as the commissioner-elect, was entitled to take possession and serve three years, and to the end of the regular term of the district. *Ib.*

6. *Same.—Commissioner-Elect.—Who is.*—A commissioner who received a majority of the votes at an election held according to law is a commissioner-elect within the meaning of the act of 1885, whether he has received his certificate of election or not. *Ib.*

PARENT AND CHILD.

1. *Custody of Child.—Estoppel.*—Where a parent places his child in the

care and keeping of another, verbally agreeing that the latter may have the custody of such child during minority, he is not thereby estopped to afterwards reclaim its custody. *Brooke* v. *Logan*, *183*

2. *Same.—Fitness of Father.—Right to Custody as Against Guardian.*—If a father is a suitable person he is entitled to the custody of his infant child as against its statutory guardian; but the controlling consideration is the welfare of the child, and if a sufficient reason exists why the father should not have its custody, it will be given to others better fitted. *Ib.*

3. *Same.—Res Judicata.—Appointment of Guardian.*—In order that the appointment of a statutory guardian may be conclusive as against the father's right to the custody of his child, it must appear that he was in court in such manner that the question of his fitness must have been passed on in appointing the guardian. *Ib.*

4. *Same.—When Question of Custody Conclusively Settled.*—The question of the custody of a minor child, once properly and finally adjudicated, whether in *habeas corpus* proceedings or otherwise, is settled for all time, unless there be an appeal, and the judgment can not be attacked collaterally. *Ib.*

5. *Same.—Habeas Corpus.—Proceeding to Remove Guardian.*—In a proceeding by a father to have the statutory guardian of his child removed and himself appointed, a judgment refusing to grant such relief does not involve the right to the custody of the child, and is not a bar to a proceeding by *habeas corpus*. *Ib.*

6. *Same.—Return to Writ.—Sufficiency of.*—Where the return to the writ of *habeas corpus* is good upon one ground it is sufficient as against a general exception to it. *Ib.*

PARTIES.

See DECEDENTS' ESTATES, 6; EXECUTION, 2; INSURANCE, 1; JUDGMENT, 6.

PARTITION.

1. *Sale of Real Estate.—Appointment of Commissioner.—Pleading.*—Allegations that a commissioner to sell real estate was appointed at a certain term of court, and gave bond, which was approved by the court, etc., sufficiently shows that the appointment was made by the court. *Coggeshall* v. *State, ex rel.*, *561*

2. *Same.—Averment that Money is Due.*—A complaint on the bond alleging that the commissioner's final report showed that he had in his hands a certain sum as the relator's distributive share of the proceeds of the sale, which had never been paid to the relator by any one, is good, without a direct averment that there is due from the commissioner the sum mentioned. *Ib.*

3. *Same.—Commissioner to Sell.—Vacancy.—Power to Appoint Successor.*—Although there is no statute expressly providing for the appointment of a successor, in case of a vacancy, to a commissioner appointed to sell land in partition proceedings, the court nevertheless has power to fill such vacancy, and to require a bond conditioned for the faithful discharge of the duties of the trust. *Ib.*

4. *Same.—Duty of Commissioner to Make Distribution.—Bond.*—Under section 1204, R. S. 1881, it is the duty of the commissioner or his successor to pay the money arising from the sale to the persons entitled thereto, according to their respective shares, under the direction of the court, and this statutory provision becomes a part of the bond executed by him as fully as if written therein. *Ib.*

5. *Same.—Paying Proceeds of Sale to Clerk.—When no Defence to Action on Bond.*—The fact that the commissioner paid to the clerk of the court the proceeds of the sale and took his receipt therefor, is no defence to

an action on the bond of such commissioner by distributees, unless such payment was authorized by an order of the court. *Ib.*

PARTNERSHIP.

1. *Set-Off.—Counter-Claim.*—To a complaint by three persons claiming to be partners, an answer by way of set-off and counter-claim that the defendant is not indebted to the firm as so constituted, but that his business dealings had been wholly with the firm composed of two of the plaintiffs only, who, as such partners, were indebted to the defendant in a sum exceeding that sued for, and offering to set off an equal sum against any amount found due said two plaintiffs and asking judgment against them for the balance, is good. *Rush* v. *Thompson*, *158*

2. *Same.—Representations by One Partner that Another is not Member of Firm.*—One partner, dealing in the name of the firm, can not deprive another member of the firm of his interest in the partnership assets by representations to others with whom he deals that such person is not a member of the firm, where the latter neither authorizes nor knows of such statements. *Ib.*

3. *Same.—Set-Off.—Mutuality.*—Where a firm composed of three persons sues to recover a debt due to the firm as so constituted, the defendant can not set off a debt due from two of the partners to him against their proportion of the debt sued for. *Ib.*

PAYMENT.

See INSURANCE, 2 to 4, PROMISSORY NOTE, 1, 2.

Acceptance of Notes as Such.—Cancellation of Mortgage.—Defence.—Where a mortgagee receives the notes of a third party, importing a consideration, agreeing to accept them in payment of the mortgage debt, such payment, in the absence of fraud, is valid, and the mortgagor may maintain an action for the cancellation of his indebtedness and the mortgage securing it. In such case, the defence that the notes received were worthless, or that there was fraud, if available at all, can only be made so by answer. *Johnson* v. *Moore*, *91*

PENALTIES.

See APPEAL BOND.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE; CONTRACT, 1, 5; SALE.

PHYSICIAN.

See EVIDENCE, 2; MEDICINE AND SURGERY.

PLEADING.

See CHATTEL MORTGAGE, 1, 5, 6; CONTRACT, 1, 2; CRIMINAL LAW; DECEDENTS' ESTATES, 8, 9; DRAINAGE, 3; ESTOPPEL; EVIDENCE, 4, 5; GRAVEL ROAD; INJUNCTION; INSURANCE, 5; JUDGMENT, 2, 5, 15; NEGLIGENCE, 3, 5, 6; OFFICE AND OFFICER, 2, 3; PRACTICE; PROCEEDINGS SUPPLEMENTARY TO EXECUTION; QUIETING TITLE; RAILROAD, 13 to 15; RECOGNIZANCE; SLANDER, 2; SUPREME COURT, 2, 3.

1. *Action to Cancel Note and Mortgage.—Not Necessary to File Such Instruments with Complaint.—Exhibit.*—In an action to cancel a note and mortgage, it is not necessary that such instruments be made part of the complaint or filed therewith as exhibits. *Johnson* v. *Moore*, *91*

2. *Ambiguity.— Demurrer.— Motion to Make Certain.*—Where a pleading contains a statement of all the facts essential to constitute a cause of action, although in general and ambiguous terms, it is good on demurrer, but may be made more certain on motion.
Jones v. *State, ex rel.*, *193*

3. *Claim Against County.—Formal Complaint Not Necessary.*—In presenting a claim against a county for allowance by the board of commissioners, no formal complaint is necessary; but a detailed statement of the items charged for, with the dates when necessary to their identification, is all that is required. *Board, etc., v. Wertz, 268*

4. *Abatement.—Premature Bringing of Action.—Practice.*—Matter tending to show that an action has been prematurely brought is only available by plea in abatement, and if pleaded with defences in bar without verification may be stricken out or held bad on demurrer. *Moore v. Sargent, 484*

5. *Supplemental Complaint.—Separate Demurrer Unauthorized.—Practice.*—A supplemental complaint constitutes a part of the original complaint, and a separate demurrer to it will not lie, and, if filed, it should be disregarded. *Farris v. Jones, 498*

6. *Same.—When Complaint Stands as Unchallenged.*—Where, after the filing of a supplemental complaint, the defendant demurs separately to it and to the original complaint, such demurrers should not be entertained, and the complaint, as a whole, in the absence of further pleadings, will stand as unchallenged and unanswered. *Ib.*

7. *Each Paragraph of Complaint Must be Complete.*—Each paragraph of a complaint must be complete in itself, and omitted or defective allegations of fact in one paragraph can not be supplied or cured by reference to another paragraph. *Ib.*

8. *Demurrer.—Want of Facts.—Right to Maintain Suit.*—A demurrer to a complaint for the alleged insufficiency of facts questions both the sufficiency of the facts stated to constitute a cause of action and the right of the particular plaintiff to maintain the suit. *Ib.*

9. *Reply.—Must be Responsive.*—A reply which does not respond to all the paragraphs of answer to which it is addressed is bad on demurrer. *Bottles v. Miller, 584*

PRACTICE.

See BILL OF EXCEPTIONS; CRIMINAL LAW; DECEDENTS' ESTATES, 2, 10; DEMURRER TO EVIDENCE; GRAVEL ROAD; GUARANTY, 5; INSTRUCTIONS TO JURY; JURY; NEGLIGENCE, 8; NEW TRIAL; PLEADING; PROCEEDINGS SUPPLEMENTARY TO EXECUTION; SPECIAL FINDING; SUPREME COURT; TRIAL; WITNESS.

1. *Motion.—Rejection of.*—Where a motion shows on its face a right to the relief it asks, it can not be rejected on the motion of the adverse party. *Johnson v. Moore, 91*

2. *Supreme Court.—Appeal.—Motion for New Trial.—Bill of Exceptions.*—Where one of the causes relied on in a motion for a new trial is the rejection of offered evidence, the motion must specifically indicate the evidence offered and excluded, and the bill of exceptions must show that the evidence offered was that indicated in such motion. *Sertel v. Graeter, 117*

3. *Pleading.—Evidence.*—Proof of a cross-complaint can not be made under an answer of general denial. *Rush v. Thompson, 158*

4. *Witness.—Objection to Question.—Statement as to what Evidence is Expected.*—Where a question is propounded to a witness, to which an objection is sustained, the party introducing the witness must, to make the ruling available as error, state to the court what evidence he expects to elicit by the answer to the question. *Cincinnati, etc., R. W. Co. v. Lutes, 276*

5. *Insufficient Answer.—Defective Demurrer.—Harmless Error.*—There is no available error in sustaining a defective demurrer to a bad answer. *Palmer v. Hayes, 289*

6. *Striking Out Evidence.*—A party can not complain of the striking out of evidence, the admission of which was not authorized by his pleadings. *Muncie National Bank* v. *Brown*, 474

7. *Calling Case for Trial.*—Calling a case for trial is an announcement or declaration by the court that it has been reached in its order, and that a judicial examination of the issues upon which the decision of the case depends is about to begin. *Moore* v. *Sargent*, 484

8. *Finding of Facts.—When Regarded as a General Finding.*—A finding made by the court upon the trial of a cause, no matter how full it may be, will be regarded on appeal as a general finding, unless the record shows that it was made in writing, at the request of one or both of the parties, and signed by the judge. *Conner* v. *Town of Marion*, 517

9. *Reserved Questions of Law.—Causes for New Trial.*—Alleged errors occurring at the trial must be made grounds of a motion for a new trial, and this rule applies as well to questions of law reserved under section 630, R. S. 1881, as to questions reserved under the general rules of practice authorized by the code. *Ib.*

10. *Same. Questions Arising on Evidence.—Bill of Exceptions.*—Where, under section 630, R. S. 1881, the reserved question of law arises on evidence admitted at the trial, all the evidence which has any bearing upon the reserved question must be made part of the record by the bill of exceptions, to enable the Supreme Court to apprehend the particular question involved. *Ib.*

PREFERENCE OF CREDITOR.

See BANKRUPTCY; LABORERS AND EMPLOYEES.

PRESUMPTION.

See CHATTEL MORTGAGE, 3; EXECUTORS AND ADMINISTRATORS, 4; FRAUDULENT CONVEYANCE, 1; NEGLIGENCE, 19; RAILROAD, 16, 17, 23; SPECIAL FINDING, 1; SUPREME COURT, 4.

PRINCIPAL AND AGENT.

See INSURANCE, 2 to 4, 6, 7; RAILROAD, 3.

PRINCIPAL AND SURETY.

See APPEAL BOND; GUARANTY; GUARDIAN AND WARD; MORTGAGE, 1 to 3; PROMISSORY NOTE, 7, 8; RECOGNIZANCE; TOWNSHIP TRUSTEE.

PRIORITY OF LIEN.

See CHATTEL MORTGAGE, 10; LABORERS AND EMPLOYEES; MINES; MORTGAGE, 8, 9.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 2; WITNESS, 1.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. *Pleading.—Method of Testing Sufficiency of Affidavit.—Motion to Quash.—Practice.*—In a proceeding supplementary to execution, the statutory methods of testing the sufficiency of the order and affidavit, viz., by demurrer, motion to dismiss or motion to strike out, must be pursued, and a motion to quash the writ and order, not being authorized by the statute, should be overruled. *Hutchinson* v. *Trauerman*, 21

2. *Same.—Civil Action.—Amendment of Affidavit.*—A proceeding supplementary to execution is a civil action, and the modes of procedure and rules of practice fixed by the code in civil actions are applicable to such proceeding, except where the statute on that subject has prescribed a different procedure and practice. Where, in such a proceed-

ing, a demurrer has been sustained to the original affidavit, the plaintiff may be allowed to amend and proceed as in other civil actions. *Ib.*

3. *Same.—Special Finding of Facts and Conclusions of Law.—Practice.*—Upon the hearing of such a proceeding, the statute does not contemplate that either party may require the trial court to make a special finding of facts therein and state its conclusions of law thereon. *Ib.*

PROFITS.

See DAMAGES; EVIDENCE, 9.

PROMISSORY NOTE.

See MORTGAGE, 1 to 4; PAYMENT; STATUTE OF LIMITATIONS, 2 to 4; TOWNSHIP TRUSTEE, 4, 5.

1. *Duty of Maker to Ascertain Proper Person to Whom Payment Should be Made.*—It is the duty of one having a matured outstanding note, in which no specific place of payment is appointed, to seek out the persons entitled to receive payment and discharge his debt, without waiting until those so entitled establish their right. *Gale v. Corey, 39*

2. *Same.—Death of Payee.—Decedents' Estates.—Interest.—Abatement of.—Payment.*—Upon the death of the payee of a matured promissory note, interest will not abate thereon, although the maker has the money set apart with which to pay it, and although there is no administration on the estate, the minor heirs of the deceased are without guardians, and it is uncertain as to whether there is indebtedness against the estate. If the maker desires to escape the payment of interest he should cause letters of administration to issue, and pay the debt to the administrator. *Ib.*

3. *Same.—Interest After Maturity.—Contract.*—Where a promissory note, by its terms, becomes due at a specified time subsequent to the death of a third party, who, during his lifetime, is to receive the interest thereon, and provides that on the death of such party interest shall cease, such latter stipulation will operate to relieve the maker from the payment of interest from the death of such party until the maturity of the note, after which interest is recoverable at the statutory rate. *Ib.*

4. *Endorsement.—Fraud.—Innocent Purchaser After Maturity.—Estoppel.*—Where the holder of a promissory note is induced, by fraud and without consideration, to endorse and deliver the same to another, who, after maturity, endorses it to an innocent purchaser for value and without notice, the latter takes title, the original holder being estopped as against him to deny the title of the fraudulent endorsee. *Moore v. Moore, 149*

5. *Set-Off Against Assignor.—Reply by Assignee.—Sufficiency of.*—In a suit by the assignee, after maturity, of a promissory note, it is a good reply to an answer of set-off by the maker against the assignor that the maker is indebted to such assignor in a sum in excess of that claimed as a set-off. *Meeker v. Shanks, 207*

6. *Legal Inception.—Delivery to Person Other than Payee.*—It is not essential to the legal existence of a promissory note that it should have been delivered to the person named therein as payee. *Ib.*

7. *Sureties. Inquiry.—Fraud.—Consideration.*—If paper is signed for a special purpose in which the sureties are interested, the fact that it is made payable to a particular person may be sufficient to put another who takes it upon inquiry; and if to take it will operate as an injury or fraud upon the sureties, they may defend against it for want of consideration. *Ib.*

8. *Accommodation Makers.—Perversion of Paper.*—Where mere accommo-

dation makers, having no interest beyond the accommodation of their principal, either in the mode of raising the money or in the manner in which it is to be applied, sign a promissory note made payable to a named person, the fact that without their consent the note is delivered to another, without any alteration, who advances the money upon it, does not constitute such a perversion of the paper as will defeat it in the hands of a holder for value. *Ib.*

9. *Rate of Interest.—Lex Loci Contractus.*—Where promissory notes, in which no interest is specified or contracted, are executed and payable in another State, or at some specified place therein, the liability of the maker as to all matters contracted for therein is governed and measured by the laws in force in that State. *Kopelke* v. *Kopelke, 456*

10. *Same.—Place of Payment.—Interest.—Damages.—Lex Fori.*—Where, however, promissory notes are payable generally, no place of payment being fixed, the general rule is that the *lex fori* governs in the collection thereof; and where no interest has been provided for therein, the interest recoverable after a breach of the contract is recoverable, if allowed, as damages; and where interest is adjudged as damages upon such contracts, the rate of interest will be governed by the law of the place of suit. *Ib.*

PROSECUTING ATTORNEY.

See ARGUMENT OF COUNSEL; CRIMINAL LAW, 7; INTOXICATING LIQUOR, 3; MEDICINE AND SURGERY, 2 to 4.

PROSTITUTE.

See CRIMINAL LAW, 5.

QUIETING TITLE.

See EXECUTION, 2.

Complaint.—Relief of Different Character.—A complaint to quiet title to land, upon a specific claim of absolute ownership, does not entitle the plaintiff to relief of an entirely different character.
Johnson v. *Murray, 154*

QUO WARRANTO.

See MEDICINE AND SURGERY, 2 to 4; OFFICE AND OFFICER, 2, 3.

RAILROAD.

See CONTRACT, 4; NEGLIGENCE, 9 to 16, 20, 21.

1. *Negligence.—Carrier.—Passenger Taking Wrong Train by Mistake.*—Where a person has bought a ticket over a railroad, and by mistake takes passage on the wrong train, he is a passenger so far as to entitle him to protection against the negligence of the company.
Cincinnati, etc., R. R. Co. v. *Carper, 26*

2. *Same.—Directions of Conductor to Passenger.—Contributory Negligence.*—Where the directions of the conductor of a passenger train are within the scope of his authority, and obedience to them will not expose a passenger to known or apparent danger which a prudent man would not incur, obedience by the passenger is not contributory negligence, although it may result in bringing injury upon him. *Ib.*

3. *Same.—Principal and Agent.—Authority of Conductor.—When Terminated.—Responsibility of Carrier for Act of Agent.*—Where a passenger enters a wrong train through a mistake of his own, the authority of the conductor as the representative of the carrier terminates when a safe alighting place is provided, and the passenger has voluntarily left the train in safety. In such case the carrier is not responsible for any advice or directions given by a conductor to the passenger after he has left the train, and is not liable for any injury received

by him while acting upon such directions or advice, however erroneous, negligent or misleading the same may have been. *Ib.*

4. *Private Crossings.—Land-Owner Required to Keep Gates Closed.—Statute.—Negligence.*—Under the provisions of the act of April 8th, 1885, the land-owner for whose benefit a private farm crossing is maintained is required to keep the gates thereto closed, and the railroad company is exonerated from liability for damages resulting from his failure so to do, except where the injury or killing of animals is caused by the negligence of its servants. *Pennsylvania Company* v. *Spaulding, 47*

5. *Same.—Cattle Guards and Cross-Fences at Private Crossings not Required.*—A railroad company is not required to construct or maintain cattle-guards or cross-fences at a private farm crossing. *Ib.*

6. *Negligence.—Right of Public to Use of Track Laid in Street.—Trespass.*—Where a railroad track is laid in a public street, the rights of the public and the railroad company respecting the use thereof are mutual, though those of the latter are paramount. A person is not a trespasser who walks along such track, and if in so doing his foot becomes fastened in an opening which exists by reason of the negligent construction of the track, and he is run upon by a train of the railroad company, which is negligently managed, he being without fault, the railroad company is liable for the injuries sustained.
Louisville, etc., R. W. Co. v. *Phillips, 59*

7. *Private Farm Crossings.—Railroad Company not Liable for Injuries to Animals Going Upon Track at Such Points.—Statute.*—Under the acts of April 8th and 13th, 1885, a railroad company is not liable, in the absence of negligence, for the injury or killing of animals going upon its track through gates at private farm crossings, whether such crossings were constructed prior to those acts, or under the power given by the first section of the act of April 8th, or since the passage of those acts. *Hunt* v. *Lake Shore, etc., R. W. Co., 69*

8. *Statute.—Constitutional Law.—Fifth Section of Act of April 13th, 1885, Constitutional.*—The 5th section of the act of April 13th, 1885, which provides for the fencing of rights of way by railroad companies, the construction of cattle-guards, etc., is valid and constitutional, being sufficiently connected with the subject as expressed in the title. *Ib.*

9. *Fencing Right of Way.—Act of April 13th, 1885, Did not Repeal Prior Statute.—Liability for Animals Killed.*—The act of April 13th, 1885 (Acts 1885, p. 224), relating to the fencing of railroad rights of way, did not repeal by implication the prior act on the same subject (R. S. 1881, section 4025, *et seq.*), and for a failure to fence at all places required by the prior statute, railroad companies are liable as previously, except so far as farm crossings and gates are concerned.
Jeffersonville, etc., R. R. Co. v. *Dunlap, 93*
Pennsylvania Co. v. *McCarty, 322*

10. *Same.—Joint and Several Liability of Owner and Lessee.—Incorporated Towns.—Platted Portions.—Procedure.*—The prior statute not being repealed, the corporation owning a railroad, and its lessee, etc., are jointly and severally liable for the killing of animals upon the track thereof within such portions of an incorporated town as are laid out and platted, if the right of way could have been fenced at the place of killing, and the manner of commencing and prosecuting actions and of collecting judgments is the same as formerly. *Ib.*

11. *Same.—Injury Must be Done by Cars or Engines.*—Under the act of April 13th, 1885, as well as under the prior act, railroad companies are not liable for the injury or killing of animals unless injured or killed by the cars or engines. *Ib.*

12. *Right of Way.—Liability for Killing Animals Turned into.—Fence.*—

Private Gate.—Where one habitually turns his horses into the right of way of a railroad company, through a gate maintained for his accommodation, in order that they may reach a pasture field adjoining the right of way, between which and the latter there is no fence, he can not recover their value if killed.
Fort Wayne, etc., R. R. Co. v. Woodward, 118

13. *Wrongful Appropriation of Land.—Agreement of Parties.—Damages.—Complaint.—Practice.*—In an action against a railroad company for the wrongful appropriation of land, an agreement by the parties thereto, made in open court, fixing the amount of damages which the plaintiff is entitled to recover, if he has a cause of action, will be enforced; and in such case, if some part of the cause of action averred is good and unanswered, the plaintiff is entitled to recover the stipulated damages. *Bloomfield R. R. Co. v. Grace, 128*

14. *Same.—Pleading.—Defence.—Adoption by Railroad Company of Acts of Contractor or Receiver.*—Where, in such a proceeding, the complaint shows a wrongful appropriation of the plaintiff's land, an answer that the appropriation was made by a contractor of the railroad company, or by the receiver of such contractor, is bad on demurrer. If the railroad company adopts the acts of its contractor and the receiver, in appropriating the land, it must pay a just compensation. *Ib.*

15. *Same.—Defence.—Answer.—Former Adjudication.*—In such an action, an answer which attempts to set up the defence of former adjudication, by averments that in a former suit against an insolvent construction company, concerning funds in the hands of the officers of the court, or which might come into their hands, upon which parties other than the plaintiff had claims, the plaintiff might have litigated his claim, but which does not show that he had notice of the pendency of such proceeding, or was a party thereto, is insufficient. *Ib.*

16. *Negligence.—Presumption that Men will Act Reasonably.—Extraordinary Conditions.*—Persons in control of railroad trains have a right to presume that men of experience will act reasonably in all given contingencies. They are not bound to anticipate and provide against extraordinary, unusual and improbable conditions, which involve inattention on the part of others, and their duty to persons thus situate only begins when they have good reason to suppose that they are unconsciously in peril or disabled from avoiding it.
Cincinnati, etc., R. W. Co. v. Long, 166

17. *Same.—Presumption that Men will Leave Track.*—A watchman or lookout on a train, moving slowly, with bell ringing, may presume, when he sees a man walking soberly on or near the track, that the latter has observed the train, if by the exercise of care he could have observed it, and, unless something indicates the contrary, that he will step aside so as to avoid injury. *Ib.*

18. *Same.—Tracks Used by Several Railroads.—Liability to Servants of Other Companies.*—The employees of a railroad company, whose track connects with union tracks belonging to a distinct corporation, which are used for switching and other local purposes by the several railroads centering in the city where they are laid, may assume that the servants of other companies, who are discharging duties upon the tracks and grounds of the union company, will observe a degree of care commensurate with the known perils of the situation and the duties required of them. *Ib.*

19. *Same.—Switchman.—Injury While Discharging Duty.—Care Required of.*—A railroad company using one of the union tracks is not liable for an injury to a switchman employed by another company, sustained by being struck by a slowly backing train, with bell ringing, while walking upon or near such track to reach a switch standard to be operated by

him, where, by the exercise of the same degree of vigilance for his own safety as would be required of a traveller or other person rightfully at the same place, he could have avoided the injury. *Ib.*

20. *Same.—Backing Train.—City Ordinance Requiring Watchman on.—Failure to Give Warning.*—A city ordinance, requiring a watchman to be stationed on the rear end of trains running backward through the city, in order to avoid accidents, does not require the watchman to stop the train or sound a warning when he has reason to believe that the person in the way of the train can and does see it approaching, and is in a situation to avoid danger by the exercise of his own volition; and the failure of the watchman to so act under such circumstances does not charge the company with negligence. *Ib.*

21. *Same.—Absorbing Duty.—Contributory Negligence.*—In the absence of any special circumstances, an experienced switchman, who is proceeding with his customary duties between two tracks, where the observance of care will enable him to perform such duties in safety, can not be said to be so absorbed in his duty as to exempt him from the necessity of exercising care for his own safety, and his failure to do so constitutes contributory negligence. *Ib.*

22. *Negligence.—Railroad.—Trespasser.*—No action will lie against a railroad company for causing the death of a trespasser upon its track unless the act of its employees was wilful.
Palmer v. *Chicago, etc., R. R. Co., 250*

23. *Presumption that Person will Leave Track.*—An engineer of a moving train has a right to presume, until the last moment, that a person walking on the railroad track will leave it in time to avert danger. *Ib.*

24. *Wilfulness.—Constructive Intent to Inflict Injury.*—To constitute wilfulness, in a legal sense, it is not necessary that there should be a formed and direct intention to kill or wound any particular person; but the intent may be a constructive or an implied one. *Ib.*

25. *Same.—Reckless Disregard of Consequences.* A reckless disregard of consequences may be so great as to imply a willingness to inflict an injury and as to entitle a trespasser to recover, although there is no actual intent to harm him. *Ib.*

26. *Same.—Person Unconsciously in Peril.—Duty to Stop Train.*—If two men are seen on the track in front of a train, one risking his own safety in an effort to signal the foremost man to leave the track, the engineer is guilty of a wilful wrong if, seeing the signals, he fails to use ordinary care to stop the train; but it is otherwise if he does not see the signals. *Ib.*

27. *Same.—Rate of Speed.—When Not Material.*—As applicable to an injury to a trespasser, the rate of speed at which the train was run is not material, unless there be something making it evidence of an intentional or wilful act. *Ib.*

28. *Use of Track by Public.—License.*—Where a railroad company, either expressly or by clear implication, licenses the public to use its track in a city, town or village, it can not treat one who avails himself of the license as a trespasser. *Ib.*

29. *Passenger.—Right to be Discharged at Depot.—Liability of Carrier for Ejecting at Another Place.*—A passenger has a right to be discharged at the regular depot of the carrier, and if ejected at another place the carrier is liable. *White Water R. R. Co.* v. *Butler, 598*

REAL ESTATE.

See APPEAL BOND; DECEDENTS' ESTATES, 6, 7; DEED; EXECUTION; EXECUTORS AND ADMINISTRATORS; FRAUDULENT CONVEYANCE; MAR-

RIED WOMAN, 1; MORTGAGE; PARTITION; QUIETING TITLE; TRUST; WILL; VENDEE'S LIEN.

REAL ESTATE, ACTION TO RECOVER.

See APPEAL BOND.

RECEIVER.

See RAILROAD, 14.

RECOGNIZANCE.

1. *Forfeiture.—Action on.—Complaint.—Pleading.*—A complaint in an action on a forfeited recognizance, which alleges that the recognizance was adjudged by the court to be forfeited, and the forfeiture duly entered of record, is sufficient without an additional averment that the surety was called and required to bring in the body of his principal. *Rubush* v. *State*, *107*

2. *Forfeiture May be Adjudged on Later Day of Term than Named in Recognizance.—Practice.*—Where a recognizance is conditioned that the principal shall appear on the first day of the next term of the circuit court, and abide the orders of court therein, and where the cause is continued and set down for trial at a subsequent day in the term, the court may, on such latter day, legally adjudge the forfeiture of such recognizance, as to both principal and surety, upon the failure of the former to appear and answer. *Ib.*

3. *Action on.—Defence.—Alteration of Indictment.*—In an action upon a forfeited recognizance, an answer which avers that the indictment against the principal therein was returned in January, 1887; that such indictment charged him with the commission of a felony in December, 1887; that after a plea of not guilty thereto, the same, without the knowledge of either principal or surety, was changed and altered by the prosecuting attorney by the erasure of the figure 7 in the year 1887, so as to make the same read "1886," is bad on demurrer. Such alteration would not affect the validity of the indictment, nor vitiate the warrant issued thereon or the recognizance executed by the prisoner. *Ib.*

4. *Same.—Evidence.*—In an action on a forfeited recognizance, where, in the original proceeding, a *nolle prosequi* had been entered to the indictment, and the prosecuting attorney had been ordered by the court to prepare and file an information against the defendant, charging him with the offence described in the indictment, the affidavit and information so prepared are competent evidence. *Ib.*

5. *Record.—Collateral Attack.—Complaint.*—A record can not be impeached collaterally by the allegation of matters *dehors* the same, unless the complaint states what is shown by the record in relation to such matters. *Ib.*

RECORDING WRITTEN INSTRUMENT.

See CHATTEL MORTGAGE, 2, 4, 6.

REMEDIES.

See JUDGMENT, 11; OFFICE AND OFFICER, 2.

REPEAL OF STATUTE.

See CORONER'S INQUEST, 4; CRIMINAL LAW, 3; RAILROAD, 9; STATUTE, 2, 3.

RES ADJUDICATA.

See JUDGMENT, 5, 6, 16; PARENT AND CHILD, 3 to 5; RAILROAD, 15.

REVIEW OF JUDGMENT.

See JUDGMENT, 2 to 4.

REVIVAL OF JUDGMENT.

See EXECUTION, 4, 5.

RULE OF COURT.

See CHANGE OF VENUE; SUPREME COURT, 7.

SALE.

See EXECUTORS AND ADMINISTRATORS; INJUNCTION, 1, 3; PARTITION; SHERIFF'S SALE; TRUST, VENDEE'S LIEN; WILL.

1. *Contract.—Sale of Machine.—Warranty.—Right of Buyer to Reject.*—A contract for the sale of a machine which provides that if such machine fails, upon a fair trial, to do good work and give satisfaction the seller will take it back and the buyer shall pay nothing, does not give the latter the right to arbitrarily reject it, merely because he is not satisfied with it; but it must appear that it fails to give satisfaction on account of defects and a failure to do good work. *May* v. *Hoover*, 455

2. *Merchandise.—Order Given to One and Filled by Another.*—Where goods ordered of one person are supplied by another, the appropriation thereof by the purchaser, after notice that they are so supplied, makes him liable, as he thereby ratifies the transaction, and the ratification relates back and gives the order the same effect as if it had been originally given to the person filling it. *Barnes* v. *Shoemaker*, 512

SET-OFF.

See PARTNERSHIP; PROMISSORY NOTE, 5.

Mutuality.—Mutuality is essential to the validity of a set-off, except where it is necessary to allow the set-off in order to prevent irremediable injustice. *Rush* v. *Thompson*, 158

SHERIFF'S SALE.

See EXECUTION.

1. *Upon Writ Improvidently Issued.—Sale not Void.*—A sale of real estate under an alias writ is not void because the writ was improvidently issued, without an order from the judgment plaintiff. *Johnson* v. *Murray*, 154

2. *Same.—Irregularity.—Not Available to Judgment Creditor to Defeat Consummated Sale.* One who claims in the character of a judgment creditor can not avail himself of a mere irregularity to defeat a consummated sale. *Ib.*

SLANDER.

1. *Words not Actionable Per Se.*—The words "I know all about that case; while she was out there claiming to be the wife of George W. Funk, she was back here claiming to be my wife," do not impute a want of chastity and are not actionable *per se*. *Funk* v. *Beverly*, 190

2. *Same.—Justification—Insufficient Answer.*—An answer by the publisher of libellous words that he heard them from another, and that it is true that he did hear them, is not a justification; but to constitute a justification it must be averred that the plaintiff was guilty of the wrong or crime imputed by the words used. *Ib.*

SPECIAL FINDING.

See INSTRUCTIONS TO JURY, 2; MORTGAGE, 3; PRACTICE, 8; PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 3.

1. *Silence as to Material Facts.—Presumption.*—Where the special finding is silent in respect to certain material facts, it will be presumed that they were found against the party upon whom the burden of proving them rested. *Meeker* v. *Shanks*, 207

2. *Exception to Conclusions of Law.—Admission as to Facts.*—An exception

merely to the conclusions of law upon a special finding of facts admits that the facts have been correctly found. *Warren* v. *Sohn*, 213

3. *Statements of Evidence.—Surplusage.*—Statements of evidence in a special finding of facts will be treated as surplusage, and disregarded. *Bartholomew* v. *Pierson*, 430.

SPECIFIC PERFORMANCE.

See VENDEE'S LIEN.

STATUTE.

See CORONER'S INQUEST, 4; DRAINAGE, 1; EXECUTORS AND ADMINISTRATORS, 3, 4; FRAUDULENT CONVEYANCE; INSTRUCTIONS TO JURY, 1; INSURANCE, 6, 7; MEDICINE AND SURGERY; MINES; NEW TRIAL, 1; OFFICE AND OFFICER, 5, 6; PARTITION, 4; PRACTICE, 9, 10; RAILROAD, 4, 7 to 11; STATUTE OF LIMITATIONS; TOWNSHIP TRUSTEE, 1; WITNESS, 1.

1. *Construction of.*—In the construction of statutes the intention of the Legislature must govern, and, in ascertaining that, the courts will look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief intended to be remedied, and all like matters, and will, as far as practicable, make such application of the provisions of the statute as will best promote the object of its enactment. *Hunt* v. *Lake Shore, etc., R. W. Co.*, 69

2. *Repeal by Implication.*—Repeals by implication are not favored, but if a portion of a later statute will be destroyed by continuing any of the provisions of a prior one in force, the latter, to that extent, will be deemed repealed, notwithstanding a declaration in the later act that the prior one shall remain in force. *Jeffersonville, etc., R. R. Co.* v. *Dunlap*, 93

3. *Two Acts Upon Same Subject.—When Repeal not Implied.*—Where two acts relate to the same subject, both are to be given effect if possible, and the prior one will not be deemed repealed by implication unless the later covers the whole subject-matter embraced therein, adds new provisions and imposes different or additional penalties. *State* v. *Wells*, 237

4. *Construction.*—To ascertain the intention of the legislature in enacting any section of an act, all of the sections and provisions of the act should be construed together. In case of doubt it is proper to look to the legislative history of a statute or section of a statute. *May* v. *Hoover*, 455

STATUTE CONSTRUED.

See BILL OF EXCEPTIONS, 3, 5; CORONER'S INQUEST, 1; CRIMINAL LAW, 3 to 5, 16; DECEDENTS' ESTATES, 1 to 3, 10; JURY, 1; LABORERS AND EMPLOYEES; STATUTE; TAXES.

STATUTE OF LIMITATIONS.

See DECEDENTS' ESTATES, 2 to 4; MARRIED WOMAN, 2; MUNICIPAL CORPORATION, 8, 9

1. *Satisfaction of Judgment.*—The six years statute of limitations is no defence to a suit to obtain the satisfaction of record of a judgment. *Palmer* v. *Hayes*, 239

2. *Promissory Note.—Partial Payment by One Joint Maker.—Effect as to Others.*—A payment upon a promissory note by one joint and several maker will not defeat the operation of the statute of limitations as to any other maker, nor deprive the latter of his right to avail himself of the statute as a defence. *Bottles* v. *Miller*, 584

3. *Same.—Mortgage.—Non-Residence.—Insolvency.*—Where, in an action

upon a note and mortgage, one of four joint and several makers answers the twenty years statute of limitations, a reply alleging the death and insolvency of two, and a partial payment by the third prior to the running of the statute, after which the latter had left the State, and still continued to be a non-resident, is bad. *Ib.*

4. *Same.—Debt not Barred, Mortgage not Barred.*—A payment upon a note secured by mortgage, if sufficient to take the note out of the operation of the statute of limitations, will have a like effect upon the mortgage; and, so long as any part of the debt remains unpaid and not barred, the lien of the mortgage continues unimpaired. *Ib.*

STOCK AND STOCKHOLDERS.

See BANKS AND BANKING.

STREETS AND SIDEWALKS.

See MUNICIPAL CORPORATION; NEGLIGENCE, 1, 2; RAILROAD, 6.

STRUCK JURY.

See JURY.

SUMMONS.

See JUDGMENT, 10, 12.

Against Township Trustee.—Will Not Authorize Judgment Against Township.—A summons against the trustee of a township will not support a judgment against the township, it being necessary that the writ should go against the corporation and not against its agent.
Vogel v. *Brown Township, 299; Vogel* v. *Brown School Township, 317*

SUPREME COURT.

See BILL OF EXCEPTIONS; INSTRUCTIONS TO JURY; PRACTICE, 2, 8 to 10; TRIAL.

1. *Practice.—Reversal of Judgment on Evidence.*—Where the evidence does not sustain, or tend to sustain, the decision of the trial court on every material issue, the judgment will be reversed.
Hutchinson v. *Trauerman, 21*

2. *Variance.—Pleading.—Evidence.*—A verdict will not be disturbed on account of an immaterial variance between the pleading and proof.
Louisville, etc., R. W. Co. v. *Phillips, 59*

3. *Pleading.—Harmless Error.*—Where a demurrer has been sustained to a good paragraph of answer, and there is no other paragraph under which the same facts are admissible in evidence, the Supreme Court can not, by looking to the evidence or to the finding of the trial court, pronounce the error harmless. *Rush* v. *Thompson, 158*

4. *Showing of Error. —Presumptions.*—All presumptions are in favor of the decisions of the trial court, and where a party claims on appeal that the lower court erred, he must so save and present the alleged erroneous decision, in the record, as to exclude every reasonable presumption in its favor. *Whisler* v. *Lawrence, 229*

5. *Verdict.—Will not be Disturbed When There is Evidence Sustaining it.*—Where the evidence fairly tends to sustain the verdict on every material point it will not be disturbed on appeal. *Cowger* v. *Land, 263*

6. *Instructions to Jury.—Considered Together.*—If the instructions given, when considered together, state the law correctly, as applicable to the issues and evidence, no available objection can be based thereon. *Ib.*

7. *Practice.—Motion to Dismiss.—Non-Compliance with Rule 19.*—Where there is a non-compliance with the provisions of rule 19 of the Supreme Court, which requires marginal notes to be placed on the

transcript, etc., the appeal will not be dismissed for that reason in a case where the transcript is brief and the judgment below is called in question chiefly upon the sufficiency of the pleadings, and where it appears that the merits of the case have been fully discussed in the briefs of both parties before the filing of the motion to dismiss.
Bass v. *Doerman*, *390*

8. *Verdict not Disturbed if Supported by Any Evidence.—Practice.*—The verdict of a jury, which has met the approval of the trial court, will not be disturbed by the Supreme Court on the evidence merely, unless the record shows an absolute failure of evidence on some material point. *Kopelke* v. *Kopelke*, *435*

9. *Practice.—Trial Without Issue.—Remedy.*—Where there is in fact no answer to a complaint, but the cause is tried upon the theory that there is an answer of general denial, the plaintiff can not, on appeal, take advantage of the absence of an answer; his remedy is by appropriate motion in the trial court. *City of Warsaw* v. *Dunlap*, *576*

10. *Reversal for Want of Evidence.—Practice.*—Where there is a failure of the evidence to sustain the verdict on any one material point, the judgment will be reversed on appeal. *Id.*

SURETY.

See APPEAL BOND; GUARANTY; GUARDIAN AND WARD; MORTGAGE, 1 to 3; PROMISSORY NOTE, 7, 8; RECOGNIZANCE; TOWNSHIP TRUSTEE.

TAXES.

See INJUNCTION, 1, 3; MUNICIPAL CORPORATION, 6 to 9.

City and Town.—Unplatted Agricultural Lands Lying Within.—Percentage of Taxation. Statute Construed.—Under section 3261, R. S. 1881, unplatted agricultural lands, containing five acres or more, lying within the limits of a city or incorporated town, are not taxable by the city or town for general city or town purposes at a higher aggregate percentage than the aggregate percentage of the tax levied in the civil township for general township purposes; but such lands are subject to all special assessments which affect them in common with other property of the city or town. *Dickerson* v. *Franklin*, *173*

THREATS.

See CRIMINAL LAW, 12 to 15.

TIME.

See APPEAL; MORTGAGE, 8, 9.

TOWN.

See MUNICIPAL CORPORATION; RAILROAD, 10; TAXES.

TOWNSHIP.

See JUDGMENT, 7, 8, 10, 12; SUMMONS; TOWNSHIP TRUSTEE.

TOWNSHIP TRUSTEE.

See DRAINAGE; JUDGMENT, 10, 12; SUMMONS.

1. *Township.—Indebtedness.—Liability of Trustee and Sureties.—Act of 1883.*—To render a township trustee and his sureties liable under the act of March 5th, 1883 (Acts of 1883, p. 114), a debt must have been contracted in the name or in behalf of the township, and in violation of sections 6006 and 6007, R. S. 1881, which require an order from the county commissioners in certain cases. *State, ex rel.*, v. *Hawes*, *523*
State, ex rel., v. *Brown*, *600*

2. *Same.—Definition of Debt.*—It is essential to the idea of a debt that an enforceable obligation must have arisen out of a contract, express

or implied, in favor of one occupying the relation of creditor, and entitling him to receive a sum of money. *Ib.*

3. *Same.—School Supplies.*—A township trustee can not contract a debt for school supplies, unless supplies suitable and reasonably necessary for the township have been actually delivered to and received by the township. *Ib.*

4. *Same.—Paper Issued Without Consideration Void.*—Where paper, purporting to be the obligation of a township, has been issued without any consideration, it is void, and creates no debt, and the holder, whether the payee or an assignee, has no right of action under the act of 1883. *Ib.*

5. *Same — Law Merchant.— Innocent Holder.*—A certificate, issued by a township trustee, reciting that there is due the payee a certain sum for school supplies bought and received by the township, is not negotiable according to the law merchant, and, where fraudulently issued, without consideration, is void, even in the hands of subsequent holders. *Ib.*

TRANSCRIPT.

See EVIDENCE, 1, EXECUTION, 6.

TRESPASS.

See RAILROAD, 6, 22, 27, 28.

Drainage Commissioner.—Personal Liability.—Void Judgment.—Turnpike Company.—A drainage commissioner who constructs an open ditch across a turnpike, assuming to act under proceedings to which the turnpike company was not a party, is a trespasser, and personally liable, the judgment being void as to the company, and affording the officer no protection. *Cottingham v. Fortville, etc., T. P. Co., 522*

TRIAL.

See PRACTICE, 7; SUPREME COURT, 9.

By Court.—Jury.—Waiver of Objection.—Practice.—Where a party does not ask for a trial by jury, nor object to a trial of the cause by the court, with a jury as advisory merely, it is too late to object on appeal to the mode of trial. *Jarboe v. Severin, 572*

TRUST.

See FRAUDULENT CONVEYANCE, 1.

1. *Parol.—Real Estate.—Proceeds of Sale.*—An express trust in land can not be established by parol; but a parol agreement to hold the proceeds of a sale of the land in trust for another is valid, if upon a sufficient consideration. *Mohn v. Mohn, 285*

2. *Same.—Consideration.—Equitable Obligation.*—Such an equitable obligation arises out of an agreement of a grantee to hold the land in trust for the grantor as constitutes a sufficient consideration for a subsequent agreement to hold the proceeds of a sale of the property in trust for such grantor. *Ib.*

TURNPIKE.

See GRAVEL ROAD; TRESPASS.

VACANCY.

See PARTITION, 3.

VARIANCE.

See CRIMINAL LAW, 11; SUPREME COURT, 2.

VENDEE'S LIEN.

Specific Performance.—Decedents' Estates.—Administrator's Sale.— Contract. — The vendee of a purchaser of land from an administrator, who has paid the purchase-price, but received no deed, and whose title has been invalidated by a judgment setting aside the sale by the administrator, can not maintain an action for the specific performance of the contract of sale, but may enforce a vendee's lien against the land for the amount of the purchase-price paid by him, and is entitled to an order requiring the administrator to re-sell the land to make assets for the payment of his debt, in an action brought for that purpose and proceeding upon that theory. *Stults* v. *Brown*, 370

VENDOR AND PURCHASER.

See Decedents' Estates, 7; Execution, 1, 2; Vendee's Lien.

VENUE.

See Change of Venue.

VERDICT.

See Negligence, 8; Supreme Court, 2, 5, 8.

WAIVER.

See Gravel Road, 3; Insurance, 3; Mortgage, 4; New Trial, 2; Trial.

WARRANTY.

See Contract, 5; Deed; Sale, 1.

WHARFAGE.

See Municipal Corporation, 3.

WIDOW.

See Coroner's Inquest, 3; Will.

WILL.

See Executors and Administrators.

Construction.—Widow.—Rents and Profits.—Sale of Real Estate.—Where, by one item of his will, a testator devises to his wife for life the rents and profits of his real estate, and by a subsequent item directs that the property be sold and the proceeds loaned for the benefit of his wife, the two provisions will be construed together and held to mean, that so long as the real estate remains unsold the widow shall have the rents and profits, and after sale the interest on the purchase-money. *Davis* v. *Hoover*, 423

WITNESS.

See Criminal Law, 14, 15; Evidence, 2, 3, 8; New Trial, 5; Practice, 4.

1. *Husband and Wife.—Confidential Communications.*—Testimony of a wife that her husband "was intoxicated" is not within the inhibition of section 497, R. S. 1881, which renders husband and wife incompetent to testify as to communications made to each other. *Stanley* v. *Stanley*, 143
2. *Refreshing Recollection.—Testimony at Former Trial.*—To refresh the recollection of a witness, his attention may be called to his testimony, in relation to a particular subject, at a former hearing. *Ib.*
3. *Cross-Examination.—Proper Scope of.*—Where a general subject is

brought out in the direct examination of a witness, the cross-examining party is not confined to the phases of the subject so brought out and opened, nor bound by the line of direct examination, but may ask any proper question on the general subject referred to in the examination in chief. *Vogel* v. *Harris*, 494

WORDS AND PHRASES.

See Bill of Exceptions, 1; Criminal Law, 10; Decedents' Estates, 1, 3; Evidence, 1.

END OF VOLUME 112.